Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

WASHINGTON WATER JET WORKERS ASSOCIATION; Talon Industries, Inc.; Cutting Technology, Inc.; Pacific-Rim Enterprises, Ltd.; Jetpoint Technologies L.L.C.; Specialty Metals Corp.; Definitive Solutions & Technologies, Inc.; and Maxtec, Inc.,

Petitioners,

v.

Howard YARBROUGH, in his official capacity as the Administrator of the Division of Correctional Industries; Washington State Department of Corrections, Division Of Correctional Industries; Jet Holdings, Ltd., d/b/a Microjet; and Kenneth Piel and Sharon Piel,

On Petition for Writ of Certiorari to the Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether private companies competing with a private employer of incarcerated prisoners may sue under 42 U.S.C. § 1983 for violations of 18 U.S.C. § 1761(c)(2)'s requirement that prisoners employed by private companies be paid wages comparable to those paid to workers outside of prison?

PARTIES TO THE PROCEEDINGS

The Petitioners are Washington Water Jet Workers Association, Talon Industries, Inc., Cutting Technology, Inc., Pacific-Rim Enterprises, Ltd., Jetpoint Technologies L.L.C., Specialty Metals Corp., Definitive Solutions & Technologies, Inc., and Maxtec, Inc.

The Respondents are Howard Yarbrough, in his official capacity as the Administrator of the Division of Correctional Industries; Washington State Department of Corrections, Division of Correctional Industries; Jet Holdings, Ltd., d/b/a Microjet, and Kenneth Piel and Sharon Piel.

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OPINION BELOW

The opinion of the Washington State Supreme Court was initially issued on January 16, 2003 and published at 148 Wn.2d 403, 61 P.3d 309 (2003). The initial decision is reproduced herein at App. D. Petitioners filed a Motion for Reconsideration that was granted. After rehearing the case, the Washington State Supreme Court issued a subsequent decision on May 13, 2004 and amended on May 27, 2004. The final opinion is reported at 151 Wn.2d 470, 90 P.3d 42 (2004), and is reproduced herein at App. A.

JURISDICTION

The decision of the Washington State Supreme Court was entered on May 13, 2004 and amended on May 27, 2004. Respondents sought reconsideration of the May 27, 2004 decision which was denied on August 18, 2004. App. B. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS AT ISSUE

This case involves 18 U.S.C. § 1761 (appended hereto as App. H) and 42 U.S.C. § 1983 (appended hereto as App. I).

STATEMENT OF THE CASE

This case involves Subsection (c) of the Ashurst-Sumners Act, 18 U.S.C. § 1761, a statute specifically enacted by Congress requiring the employers of convict labor to pay comparable free market labor rates because of the history of negative economic impact on businesses and their employees who compete with otherwise underpaid prisoners. Despite this Court's acknowledgement that the statute was enacted to protect private businesses from competition from goods produced with

inexpensive convict labor, the Washington State Supreme Court has held that there is no remedy for businesses being damaged by the employment of prisoners at substandard wages in violation of federal law.

Washington Water Jet Workers Association is an organization of individuals and business engaged in the water jet cutting industry. Water jet cutting involves precision cutting of hard materials, such as steel and stone, by means of a jet of water containing abrasive particles. The Association and seven water jet businesses (Petitioners) filed the underlying action against the Washington State Department of Corrections Division of Correctional Industries (DOC), its Administrator, Jet Holdings, Ltd., dba MicroJet (MicroJet), and two of its officers in regard to the State's partnership with a private company which employed inmates at a state correctional institution – a practice which was destroying their industry.

DOC and its director contracted with a private water jet company, MicroJet, giving that private company permission to hire prisoners. Under the contract, DOC provided numerous free public resources such as free rent and free or discounted utilities and equipment. Importantly, the DOC provides prison labor for which MicroJet need not pay normal worker benefits such as health insurance, vacation benefits and sick leave. Although required to pay wages comparable in the free world by both state and federal law, DOC has allowed MicroJet to ignore this requirement and pay substandard wages.

As a result, the Plaintiffs' businesses have been jeopardized and employees laid off because the water jet cutting companies which do not have access to incarcerated labor available at below market wages (and a complete absence of employee benefits) cannot compete against the unfair partnership MicroJet had with the state.

This program of using prison labor is purportedly operated under the federal Prison Industries Enhancement Certification Program (PIECP), which is an exemption from the federal prohibition of shipping prison made goods through

interstate commerce. 18 U.S.C. § 1761. In addition to violating state law, the Petitioners' complaint alleged that Respondents were in violation of this federal statute's requirement that inmates be paid comparable wages.

In the trial court, Petitioners filed a motion for partial summary judgment on their First Cause of Action which sought declaratory and injunctive relief regarding their claim that the partnership between DOC and MicroJet violated Article II, Section 29 of the Washington Constitution. The State Respondents and MicroJet filed cross motions for summary judgment. On May 5, 2000, the King County Superior Court denied Petitioners' motion and granted the State Respondents' motion for summary judgment to the extent that Petitioners were seeking a ruling that Wash. Rev. Code 72.09.100(1) under which this partnership was created was unconstitutional. During that process, Petitioners presented evidence that prisoners employed by MicroJet were paid minimum wage, $5.70 per hour and that Petitioners were required through the free labor market to pay anywhere from $13.50 to $15.00 per hour.

Thereafter, the State and MicroJet brought motions to dismiss several other of the Petitioners' causes of action. On October 30, 2000, the Superior Court dismissed Petitioners' causes of action directly under 18 U.S.C. § 1761 and Petitioners' cause of action under 42 U.S.C. § 1983. App. G. The Court also dismissed all other causes of action against Kenneth and Sharon Piel, officers of MicroJet. App. G. Petitioners appealed directly to the Washington State Supreme Court which accepted direct review.

The focus of the Washington Supreme Court was on the prohibition of private use of prison labor in Article II, Section 29 of the Washington State Constitution. That section provides that "the labor of convicts of this state shall not be let out by contract to any person, copartnership, company or corporation." Initially, the Washington State Supreme Court ruled that DOC's partnership did not violate Article II, Section 29. App. D. The Court also affirmed the trial court's dismissal of Petitioners' causes of action under 18 U.S.C. § 1761 and 42 U.S.C. § 1983. App. D. After granting Petitioners' Motion for Reconsideration, the Washington Supreme

Court reversed itself and found the DOC program did in fact violate Article II, Section 29 of the Washington State Constitution. However, the subsequent decision did not reverse the dismissal of Petitioners' claim under Section 1983. App. A. Only that claim is at issue before this Court.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way in conflict with another state court of last resort, or of a federal Court of Appeals. Rule 10(c) includes as a ground for review when a state court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. Both of these grounds for review are present in this case.

ARGUMENT

I

REVIEW SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE RATIONALES OF THE WASHINGTON STATE SUPREME COURT AND THE EIGHTH CIRCUIT COURT OF APPEALS REGARDING THE ABILITY TO ENFORCE THE ASHURST-SUMNERS ACT THROUGH SECTION 1983

The trial court dismissed Petitioners' claim that Respondents had violated the requirement in the Ashurst-Sumners Act that inmate workers be paid comparable wages to those who are not incarcerated on the basis that there was no private cause of action to enforce this requirement. It also ruled that Section 1983

provided no remedy. On appeal, the Washington State Supreme Court affirmed the dismissal of the Section 1983 claim.

> Ashurst-Sumners does not explicitly create a cause of action. [citation omitted]. Every court that has considered the matter has found that Ashurst-Sumners does not impliedly create a private cause of action, or rights enforceable through § 1983. *See McMaster v. Minnesota*, 30 F.3d 976, 981-82 (8th Cir. 1994) ("Ashurst-Sumners does not provide a private cause of action, either expressly or by implication. Furthermore, Ashurst Sumners creates no federal right enforceable by way of 42 U.S.C. § 1983."); *Wentworth v. Solem*, 548 F.2d 773, 775 (8th Cir. 1977). *Accord Gonzaga University v. Doe*, 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002).

Washington Water Jet, 148 Wn.2d at 427 (App D-23 and D-24).

The Washington Supreme Court's decision relies upon two Eighth Circuit decisions, *McMaster v. Minnesota*, 30 F.3d 976 (8th Cir. 1994) and *Wentworth v. Solem*, 548 F.2d 773 (8th Cir. 1977). Both cases concluded that Section 1983 could not be used by **prisoners** to enforce the comparable wage requirements of the Ashurst-Sumners Act because prisoners are not the intended beneficiaries of this provision. Rather, it was intended to protect those who must compete with prison labor. The Washington Supreme Court's conclusion that Petitioners cannot rely on Section 1983 conflicts with this explicit rationale of the federal court's decisions.

In *McMaster v. Minnesota*, 30 F.3d 976, 978-82 (8th Cir. 1994), the Eighth Circuit dealt with a claim by inmates that the state was violating the Ashurst-Sumners Act, by paying inmates less than $1.00 per hour. The Court in *McMaster* stated that the only "issue is whether the Ashurst-Sumners Act creates any enforceable federal rights." *Id.* at 981. The Court concluded that the comparable wage provision of the act was not for the benefit of

prisoners. Rather, it was obvious that the wage provision is for the benefit of free laborers and companies employing free labor. After reviewing legislative history and interpretation accompanying the original enactment, the Court wrote:

> [W]e learn that the Ashhurst-Sumners Act was intended to oppose "the evils attending the sale of [convict-made] goods .. in competition with goods manufactured by free labor." S. Rep. No. 906, 74th Cong., 1st Sess. (1935). *See also Kentucky Whip and Collar v. I.C.R. Co.*, 299 U.S. 334, 351, 57 S.Ct. 277, 282, 81 L.Ed. 270 (1937)(This legislation "proceeded upon the view 'that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison'").
>
> We conclude that Congress' purpose in enacting the Ashurst-Sumners Act was to protect private business, not to protect the inmate worker. As this court previously stated: "Sections 1761-62 embody Congressional interest in free labor and were designed to protect private business from competition from goods produced with inexpensive convict labor." *Wentworth [v. Solem],* 548 F.2d [773] 775 (8th Cir. 1977).

30 F.3d at 981.

The Senate Judiciary Committee Report cited by *McMaster* was clear about Congressional purpose:

> **The purpose of the bill is to protect free labor and free industry against the unfair competition of prison-made goods.** Since the Supreme Court sustained the validity of the Ashurst-Sumners Act, more than three-fourths of the States have passed laws designed

> to eliminate **the injurious competition of prison-made goods**. But a few states have failed to enact such legislation and the traffic in the products of prison labor among or between these States has **resulted in great loss both to free labor and free enterprise.**
>
> The bill has been generally approved by spokesmen for organized labor.
>
> The committee concurs in the view expressed by the Supreme Court in the following excerpt from the opinion delivered in the case of *Whitefield v. Ohio* (297 U.S. 431):
>
> > All such legislation, State and Federal, proceeds upon the view that free labor properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison.

S.Rep. No. 906, 74th Cong., 1st Sess. (1935) (emphasis added).

When the statute was amended to allow prison labor goods to sell on the open market, Congress required that prisoners be paid comparable wages to those in the free market. 18 U.S.C. § 1761 (c). It is no stretch of the imagination to realize that the purpose of such a condition was to protect free labor and free enterprise who might have to compete with prison laborers.

The Court in *Wentworth* essentially came to the same conclusion. Prisoners cannot use Section 1983 to enforce the comparable wage provisions of the Ashurst-Sumners Act because that provision was enacted to protect those who compete with prison labor, such as Petitioners. *Wentworth*, 548 F.2d at 775. This Court should grant this Petition because the Washington Supreme Court's decision is essentially at odds with the Eighth Circuit as well as this Court's declaration of the purpose of the statute in *Kentucky Whip and Collar*.

While this case was pending in the Washington Supreme Court, this Court issued its decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002) which dealt with using Section 1983 to enforce rights provided in federal statutes. In *Gonzaga,* the majority of the Court concluded that Section 1983 provided no remedy to an individual who alleged noncompliance with a government program through which federal funds were dispersed. *Id.* at 290. Instead of providing an absolute prohibition, the statute prohibited disbursement of federal funds to those educational institutions which did not "comply substantially" with the requirements of the act. *Id.* at 288.

The Court in *Gonzaga* continued the practice of answering the question as to whether federal rights were enforceable through Section 1983 by reviewing whether Congress intended to "confer federal rights upon those beneficiaries." *Id.* at 286 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)). The Court also continued to apply the framework set forth in *Wilder v. Virgina Hosp. Ass'n*, 496 U.S. 498 (1990) and *Blessing v. Freestone,* 520 U.S. 329, 330 (1997). *See Sabree ex rel Sabree v. Richman,* 367 F.3d 180 (3rd Cir. 2004); *Schwier v. Cox,* 340 F.3d 1284 (11th Cir. 2003).

The Supreme Court in *Wilder* held that Section 1983 provides a cause of action for violations of federal statutes, with only two exceptions: (1) where the statute creates "no 'enforceable rights, privileges or immunities within the meaning of § 1983'"; or (2) where "'Congress has foreclosed such enforcement in the enactment itself.'" *Wilder*, 496 U.S. at 508 n.9 (quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987)).[1]

The critical question is whether 18 U.S.C. § 1761(c)(2) provides rights to the Petitioners so as to avoid the second exception from the general rule in *Wilder* that federal statutes may

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[1] As to the second exception, when looking at 18 U.S.C. § 1761(c)(2), the court in *McMaster* noted, "there is no indication that Congress intended to foreclose enforcement of the statutes." *McMaster*, 30 F.3d at 981. No court, including the Washington Supreme Court, has indicated otherwise.

be enforced under Section 1983. The Court in *Blessing*, 520 U.S. at 330 explained that there are three factors for determining whether a statute gives rise to a right enforceable by 42 U.S.C. § 1983.

> First, Congress must have intended that the provision in question benefit the plaintiff. ... Second, the plaintiff must demonstrate that the right asserted is not so "vague and amorphous" that its enforcement would strain judicial competence. ... Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Blessing, 520 U.S. at 341.

As to the second and third requirements, the specific requirement in 18 U.S.C. § 1761(c)(2) is clear that the prohibition in subsection (a) "shall not apply" as long as the inmates "have, in connection with such work, received wages at a rate which is not less than that paid for work of a similar nature." This is both mandatory and unmistakable. It is not so vague or amorphous that the Court cannot enforce it by means of declaratory relief.[2]

Therefore, the question of whether there are federal rights "turns on whether 'the provision in question was intend[ed] to benefit the putative plaintiff.'" *Wilder*, 496 U.S. at 509 (quoting *Golden State*, 493 U.S. 103 (1989)). As addressed previously, the court in *McMaster* was reviewing the Ashurst-Sumners Act and had no trouble concluding that the wage requirements were not for the benefit of **prisoners**. 30 F.3d 981. The reason is that the obvious purpose of the wage provisions are to benefit those who must compete with prison laborers—workers who are not in prison and the companies employing them. *Id.* (considering legislative history and judicial interpretation accompanying the original

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[2] *See, e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001).

enactment).[3]

Where the decision in *Gonzaga* breaks new ground is in requiring that Congress use "unambiguous language" to demonstrate an intent to create a federal right. 536 U.S. at 283. This position was not only rejected by the two dissenting justices, but also Justices Breyer and Souter, who concurred. *Id.* at 291 (Breyer, J., concurring) and 300 (Stevens, J., dissenting). This case presents the question as to whether Section 1983 can be used to enforce federal laws which were specifically and unquestionably designed to protect Petitioners, but without using in the statute language which explicitly references the class to which Petitioners belong, namely those who compete with underpaid prison labor.

Here, Congress took a preexisting prohibition in federal law on the use of prison labor to manufacture goods to enter interstate commerce and tailored an exception that had the purpose of protecting individuals and businesses such as the Petitioners. Although no court has characterized the statute as creating a right enforceable under Section 1983, every court which has reviewed the statute has recognized its purpose as one of protecting people in the Petitioners' situation.

Nevertheless, the language used by Congress is clear and unmistakable of creating an absolute prohibition on underpayment of prison labor and specifically references "work of a similar

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[3] The argument had been made below that rights enforceable through Section 1983 cannot arise from a statute which imposes criminal penalties. To the contrary, several statutes with criminal penalties may be enforced by private parties. The Voting Rights Act, 42 U.S.C. § 1973 imposes criminal penalties, yet also allows a private cause of action. *Allen v. Board of Elections*, 393 U.S. 544 (1969). One of the seminal cases discussing the use of Section 1983 to enforce federal rights which includes criminal penalties is *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989). There, the Court found that Section 1983 provided a basis to enforce the National Labor Relations Act, 29 U.S.C. Section 151, *et seq.* 493 U.S. at 113. This conclusion was reached despite the fact that 29 U.S.C. § 216(a) provides for fines and imprisonment for violating the act.

nature in the locality in which the work was performed." 18 U.S.C. § 1761(c)(2). Petitioners are the ones engaged in that similar work.

The rationale of the Eighth Circuit in the *McMaster* and *Wentworth* cases support the finding that free labor and businesses which compete with prison labor would have the ability to enforce the statute under Section 1983. The Washington State Supreme Court has cited these two cases for its opinion that Section 1983 cannot be used, but when one reads the cases it is apparent that their rationale supports the Petitioners' argument that these Petitioners should be able to seek relief under Section 1983. This Court should grant review in this case to resolve this conflict between the rationale of the Eight Circuit and the Washington Supreme Court.

II

REVIEW SHOULD BE GRANTED TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT REGARING WHETHER PETITIONERS CAN ENFORCE THE COMPARABLE WAGE REQUIREMENTS THROUGH 42 U.S.C. § 1983

Section 1983 has long been considered the most important tool for citizens to enforce protections provided in federal law. As Justice Brennan noted, "it would be difficult to imagine a statute more clearly designed 'for the public good' and 'to prevent injury and wrong' than § 1983." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 73 (1989) (Brennan, J., dissenting). The ability of Washington citizens to seek relief under Section 1983 reaches far beyond the parties in this case and is an important question of federal law that should be addressed by this Court.

Prisoner labor is an important federal issue that has far reaching impacts. In recent years, the issue has been controversial and the subject of much public debate.[4] Those hurt by prison labor

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[4] Exec. Order No. 11755, 39 Fed. Reg. 779, (Dec. 29, 1973); David

have looked to the Judiciary for various forms of relief.[5]

Congress realized the potential unfair competition between convict labor and free labor in the production of goods and services and enacted a statute specifically to protect businesses from having to compete with underpaid prisoner labor. This Court should resolve the question as to whether those intended to be protected by the statute may enforce the protections Congress provided.

CONCLUSION

The economic impact in the open market of goods made by incarcerated prisoners on those who make similar goods outside prison walls has been a widely debated issue from the late 1800s to the present. Fortunately, Congress dealt with the issue, first by prohibiting the transportation of prisoner made goods entirely and then by removing the prohibition on the specific condition that prisoners be paid wages comparable to those in the free world.

Despite this specific condition that was unquestionably designed to provide protection for those in the Petitioners' shoes, the Washington Supreme Court has ruled essentially that no one can enforce the protections which Congress provided. This Court should resolve the issue by granting this Petition.

Leonhardt, *As Prison Labor Grows, So Does the Debate*, NEW YORK TIMES, March 19, 2000; Robert McMillan, *Dell Drops Prison-Labor Recycling Deal: Environmental Group Takes Credit for Pressuring Dell to Switch Providers*, PCWORLD, July 2, 2003. James L. Tyson, *The Rise of a Cellblock Work Force*, THE CHRISTIAN MONITOR, July 12, 1999.

[5] *See Coalition for Government Procurement v. Federal Prison Industries, Inc.*, 365 F.3d 435 (6th Cir. 2004).

For these reasons, Petitioners respectfully ask that this Petition be granted.

DATED: November 12, 2004.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF WASHINGTON

WASHINGTON WATER JET WORKERS ASSOCIATION; Talon Industries, Inc.; Cutting Technology, Inc.; Pacific-Rim Enterprises, Ltd.; Jetpoint Technologies L.L.C.; Specialty Metals Corp.; Definitive Solutions & Technologies, Inc.; and Maxtec, Inc., Appellants, v. Howard YARBROUGH, in his official capacity as the Administrator of the Division of Correctional Industries; Washington State Department of Corrections, Division Of Correctional Industries; Jet Holdings, Ltd., d/b/a Microjet; and Kenneth Piel and Sharon Piel, Respondents.	No. 70814-2 **En Banc** FILED: May 13, 2004. As Amended May 27, 2004.

BRIDGE, J.

In *Washington Water Jet Workers Ass'n v. Yarbrough,* 148 Wash.2d 403, 61 P.3d 309 (2003) (*Water Jet* I), this court held that article II, section 29 of the Washington Constitution solely applies to and prohibits the State from engaging in the contract system of prison labor. *Id.* at 405-06, 61 P.3d 309. Under that holding, the existing Class I Free Venture Industries program of prison labor created by RCW 72.09.100(1) did not violate article II, section 29. *Water Jet* I, 148 Wash.2d at 406, 61 P.3d 309. A motion for reconsideration was filed by the Washington Water Jet Workers Association (Water Jet). After review, we granted the motion and

ordered a rehearing.

Upon rehearing, both the parties and amici, including the Private Industries in Prison Association et al., and the Washington State Labor Council et al., have submitted thorough historical analyses of the circumstances surrounding the adoption of article II, section 29. With the benefit of the additional historical analyses brought to light upon rehearing, we now conclude that both the plain language of article II, section 29 and the historical context in which it was adopted require that we find Class I Free Venture Industries programs, permitted by RCW 72.09.100(1), to be in direct conflict with article II, section 29 of the Washington Constitution.

Even so, we note the important public policy goals that the legislature and the Department of Corrections (Department) sought to promote when they created the Class I Free Venture Industries program. The legislature intended to avoid inmate idleness, encourage adoption of the work ethic, provide opportunities for inmate self-improvement, and provide a means for payment of restitution. RCW 72.09.010(5)(a)-(c), (7). These laudable goals need not be abandoned as a result of our holding today. We stress that there are other opportunities, in the form of state-run inmate labor programs, which would not run afoul of article II, section 29.

I
Class I Free Venture Industries

In 1981,[1] the legislature enacted the Corrections Reform Act, chapter 72.09 RCW, providing for five classes of prison labor. *See* RCW 72.09.100.[2] The first class of prison labor in RCW 72.09.100, Class I Free Venture Industries, permits inmate work programs that are operated and managed by private profit or

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[1] Two years prior, Congress had amended the Ashurst-Sumners Act, 18 U.S.C. § 1761, to allow for the interstate transport of goods made by prisoners in state institutions, provided certain criteria were met.

[2] The legislature has since amended RCW 72.09.100(1), but the relevant language remains essentially the same.

nonprofit entities other than the Department.[3]

Pursuant to RCW 72.09.100(1), the Department created a program of inmate labor called "private sector partnerships." *See* Clerk's Papers (CP) at 22-30. The Department enticed employers with the promise of low overhead costs and a motivated and readily available work force. *Id.* The Department's promotional materials presented the allure of a higher profit margin. CP at 23. Businesses were told that they could save the costs of health insurance and other employment-related benefits, and could potentially receive bid preferences on state contracts. CP at 24. The Department, meanwhile, would benefit because inmates would obtain training and skills that could help them become an integral part of society upon release, and employment might encourage a strong work ethic among inmates. The inmate workers would pay taxes on their earnings, and wage deductions would be available to compensate victims and/or provide child support payments.

Consistent with this promotion, the Department entered into a contract with Jet Holdings, Ltd., d/b/a MicroJet (MicroJet) that allows MicroJet to use prison labor from the Monroe Corrections Center in its water jet cutting business. CP at 5-16, 18. In addition to providing access to prison labor that MicroJet's

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[3] RCW 72.09.100(1) LASS I: FREE VENTURE INDUSTRIES. The employer model industries in this class shall be operated and managed in total or in part by any profit or nonprofit organization pursuant to an agreement between the organization and the department. The organization shall produce goods or services for sale to both the public and private sector.

....

The department of corrections shall supply appropriate security and custody services without charge to the participating firms. Inmates who work in free venture industries shall do so at their own choice. They shall be paid a wage comparable to the wage paid for work of a similar nature in the locality in which the industry is located, as determined by the director of correctional industries. If the director cannot reasonably determine the comparable wage, then the pay shall not be less than the federal minimum wage.

RCW 72.09.100(1).

The statute also establishes classes of inmate labor for "TAX REDUCTION INDUSTRIES," "INSTITUTIONAL SUPPORT INDUSTRIES," "COMMUNITY WORK INDUSTRIES," and "COMMUNITY RESTITUTION PROGRAMS." RCW 72.09.100(2), (3), (4), (5). These additional classes are not before this court for consideration.

competitors do not enjoy, the contract allows MicroJet to use more than 11,000 square feet of industrial space at the correctional facility rent-free. Many utilities are provided to MicroJet free of charge or at discounted rates. The Department also agreed to provide security and a security orientation session. Under the terms of the agreement, the Department refers prison inmates to MicroJet, the company interviews and hires the inmates, and then MicroJet pays inmate wages to the Department as trustee for the inmate-workers.[4]

II
Article II, Section 29

When interpreting constitutional provisions, we look first to the plain language of the text and will accord it its reasonable interpretation. *Anderson v. Chapman,* 86 Wash.2d 189, 191, 543 P.2d 229 (1975) (citing *State ex rel. Evans v. Bhd. of Friends,* 41 Wash.2d 133, 247 P.2d 787 (1952)). Article II, section 29 states:

> After the first day of January eighteen hundred and ninety the labor of convicts of this state shall not be let out by contract to any person, copartnership, company or corporation, and the legislature shall by law provide for the working of convicts for the benefit of the state.

Const. art. II, § 29. The words of the text will be given their common and ordinary meaning, as determined at the time they were drafted. *State ex rel. O'Connell v. Slavin,* 75 Wash.2d

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[4] Amici, including the Private Industries in Prison Association, the Workman Fund, and the Class I Employers, have requested that this court take judicial notice of facts contained in a newspaper article, describing the recent success of a Washington water jet cutting business. We deny the motion because the article is not relevant to the disposition of the question before us and because the contents of the newspaper article are not the proper subject of judicial notice. *See* ER 201(b); *see also Hoppe v. State,* 78 Wash.2d 164, 170 n. 3, 469 P.2d 909 (1970) (holding that where appellant referred only to newspaper articles and an undated motel rate schedule, he had presented no authoritative facts of which the court could properly take judicial notice). Amici concurrently submitted a statement of additional authority, the subject of which was considered by the court.

554, 557, 452 P.2d 943 (1969) (citing *State ex rel. Albright v. City of Spokane,* 64 Wash.2d 767, 394 P.2d 231 (1964)). This court may also examine the historical context of the constitutional provision for guidance. *See Yelle v. Bishop,* 55 Wash.2d 286, 291, 347 P.2d 1081 (1959) ("In determining the meaning of a constitutional provision, the intent of the framers, and the history of events and proceedings contemporaneous with its adoption may properly be considered.").

A. *Systems of Convict Labor*

At the time of Washington's constitutional convention, a variety of prison labor systems existed. To determine the common and ordinary meaning of article II, section 29 at the time it was drafted, it is helpful to briefly review the systems of prison labor that would have been contemplated by the delegates to the constitutional convention. The systems have traditionally been divided into two categories: private systems and public systems. William J. Farrell, Prisons, Work and Punishment 30 (1994); Chas. P. Neill, Twentieth Annual Report of the Commissioner of Labor, Convict Labor 40-41 (1905).

1. *Private Systems*--There were three private systems of convict labor in the late 1800s: the lease system, the contract system, and the piece-price system. FARRELL, *supra,* at 30. Under the lease system, which was prevalent in the southern states after the Civil War, the State entered into a contract with a private lessee, who agreed to feed, clothe, house, and guard the convict. *Id.* at 28, 31. Inmate labor under this system was in direct competition with free labor. *Id.* at 30.

Because the lease system put the convict at the mercy of the lessee, inmates were often subjected to "unspeakable brutality." Stephen P. Garvey, *Freeing Prisoners' Labor,* 50 STAN. L.REV. 339, 357 (1998); *see also* DAVID M. OSHINSKY, "WORSE THAN SLAVERY" PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996) (discussing the history of the lease system in Mississippi). Even so, one historian has concluded that the lease system died "not because of its unrelenting cruelty but because of its susceptibility to the fluctuations of the

marketplace; especially during the depressions of the 1870s and 1880s." FARRELL, *supra,* at 31.

Unlike the lease system, the contract system required the State to feed, clothe, house, and guard the inmate. *Id.* at 28. The State selected a private contractor to manufacture its product within or near the prison, and provided convict labor. *Id.* In exchange for the benefit of the prisoners' labor, the contractor paid a stipulated amount for the services of each convict, provided raw materials, and supervised the convicts' work within the prison. *Id.* Although there is some historical evidence that the treatment of prisoners under the contract system was often cruel, at least one commentator has stated that the treatment of inmates was not that different from the treatment of free laborers. James J. Misrahi, Note, *Factories with Fences: An Analysis of the Prison Industry Enhancement Certification Program in Historical Perspective,* 33 AM.CRIM. L.REV. 411, 416 (1996). Again, convict labor under the contract system competed directly with free labor. FARRELL, *supra,* at 30. Moreover, this system allowed the State to favor one private contractor with inexpensive labor and overhead, to the detriment of its competitors.

The piece-price system was very much like the contract system, except the State was paid according to an agreed amount for each piece or article manufactured by the inmates, rather than a set price for each working inmate. *Id.* at 28. The contractor provided the raw materials and shouldered the financial risk, but in most instances, the State supervised the inmates' work. *Id.* at 28-29. Still, the piece-price system engendered the same competition issues that befell the lease and contract systems. *Id.* at 30. The private enterprise relied on prison labor, rather than free labor, and the State chose to favor one private enterprise with the benefits of prison labor.

2. *Public System*--There were two public systems of convict labor in the late 1800s: the public account system and the state-use system. *Id.* at 29-30. Under the public account system, the State owned and operated all aspects of the prison manufacturing operation; it provided raw materials, supervised the inmate workers, and sold the product into the marketplace. *Id.* at

29. Inmates did not directly displace free workers by taking private industry jobs. Moreover, the State did not favor one company over another with the benefit of prison labor. Still, public account systems produced goods that competed in the marketplace with private sector goods, creating indirect price competition. *Id.* at 30. The state-use system was more restrictive because the resulting products were not sold into the open market; instead, they were only put to state use. *Id.* at 29. Therefore, the State did not compete directly with manufacturers who were employing free labor, nor did the system favor any particular business. *Id.* at 29. Variations of the state-use system emerged, including public works systems, which employed inmates for public work outside of the prison, usually in the construction and repair of public highways. *Id.* at 29.

Several states examined their prison labor systems just before or just after Washington's constitutional convention. Where a state replaced its contract or lease system, it is important to note how the system was replaced. For example, during its constitutional convention of 1894, New York passed a "state-use" regulation, prohibiting the sale or lease of convict labor and requiring that prison labor produce products that the State itself could consume. E. STAGG WHITIN, PENAL SERVITUDE 7 (1912) (noting the nationwide movement toward state operated prison industries). Significantly, "[t]he state-use system came into prominence in the decade of the 1880s, when the contract system began to decline. By 1899, the [state-use] system had been authorized by 24 states...." FARRELL, *supra,* at 32. In addition, the proportion of convicts employed under all public systems increased from 32.8 percent in 1885 to 52.2 percent in 1903-04. NEILL, *supra,* at 40-41. Thus, just before and just after Washington's constitutional convention, there was a trend to replace private systems of inmate labor with public, state-run systems.

It is with an understanding of these various systems of convict labor, including the contemporaneous decline of the private systems, that we approach the interpretation of article II, section 29.

B. *Plain Language*

When read in its entirety, article II, section 29 requires the State to engage in one of the public, state-run systems of prison labor (public account or state use), but prohibits the State from engaging in any private system of prison labor.

First, we must look to what the provision prohibits. The first clause provides, "the labor of convicts of this state shall not be let out by contract to any person, copartnership, company or corporation." Const. art. II, § 29. The Department argues that "let out" is a term of art, whose common and ordinary meaning in 1889 referred only to the sale or lease of something as a commodity. Thus, the Department, and likewise the dissent, contend that article II, section 29 prohibits only those systems through which the State sold or leased convict labor, namely the lease and contract systems.

The Century Dictionary includes a definition of "let": "[t]o leave or transfer the use of for a consideration; put to rent or hire; farm; lease: often with *out:* as, to *let* a house to a tenant; to *let out* boats or carriages for hire." 3 THE CENTURY DICTIONARY 3419 (1889). However, the Department ignores another contemporaneous definition of the phrase "let out by contract." Although an 1897 dictionary defined "let out" in part as "[t]o lease or demise for rent or other consideration; put to hire or rent," that dictionary also defined "let out" as "[to] grant or assign, as to an applicant; frequently followed by *out;* as to *let* a contract." A STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 1021 (Isaac K. Funk et al. eds., 1897). The 1891 Black's *A Dictionary of Law* also defines the term "let," when used in the context of contracts, to mean "[t]o award to one of several persons, who have submitted proposals therefor, the contract for ... rendering some ... service to government for a stipulated compensation." 2 HENRY CAMPBELL BLACK, A DICTIONARY OF LAW 708 (1891).

In addition, numerous contemporaneous cases reveal that courts consistently used the phrase "let out by contract" to refer to the awarding or granting of a contract to a bidder. *See, e.g., Robbins v. City of Chicago,* 71 U.S. (4 Wall.) 657, 666, 18 L.Ed.

427 (1866) ("He may therefore *let out by contract* the building of the house to some person who will undertake to do it." (emphasis added) (quoting *Blake v. Ferris*, 1 Selden (5 N.Y.) 48 (1851))); *see also Bibb's Adm'r v. N. & W.R.R. Co.*, 87 Va. 711, 727, 14 S.E. 163 (1891) ("the railway company had *let out by contract*, the building of a viaduct ...." (emphasis added)); *Storrs v. City of Utica*, 17 N.Y. 104, 109 (1858) ("Although the work may be *let out by *482 contract*, the [municipal] corporation still remains charged with the care and control of the street ...." (emphasis added)). In Washington, this court discussed a code allowing county commissioners to, " 'in their discretion *let out by contract* to the lowest bidder' " work on county roads. *Giffin v. King County*, 50 Wash. 327, 329, 97 P. 230 (1908) (emphasis added) (quoting BAL.CODE § 3767). Finally, numerous additional cases used language like "let out the contract" to refer to the act of awarding or granting a contract. *See, e.g., Smith v. Wilkes & McDuffie Counties*, 79 Ga. 125, 127, 4 S.E. 20 (1887) ("[The counties] *let out the contract* to the lowest bidder ...." (emphasis added)); *Turner Ex-Parte*, 40 Ark. 548, 549 (1883) ("directed the County Court ... to make an appropriation and proceed to advertise and *let out the contract* for building another Court House." (emphasis added)).

The definition of the term "let out by contract" in these cases is obviously broader than the terms, "sell," "lease," or "rent." In each case, the government entity or company did not sell, lease, or rent a commodity; this definition does not involve compensation that runs to the State. Instead, in each case, the government entity or company granted or awarded a contract to a private entity, under which the private entity would be compensated to perform work or fulfill a need. Because these definitions and contemporaneous judicial opinions reveal the meaning of "let out" that is specifically connected to the phrase "let out by contract" and the concept of contracting, we conclude that this is the meaning that the founders and ratifying public intended to adopt.[5]

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[5] When read in accordance with this definition, article II, section 29 states that the labor of convicts shall not be granted or awarded by contract to any private entity. Such a definition is not contrary to the use of the term "let out by contract" in a contemporaneous territorial newspaper, which suggested that the Washington

The dissent attempts to contort this definition of "let out by contract" to support its theory that article II, section 29 is predicated on the concept that prison labor is a commodity that the State can sell. While the dissent admits that "let out by contract" can mean "to submit the contract out to bid," it then attempts to equate awarding such a contract with selling a government property right. Dissent at 3. However, none of the cases listed above suggest that to "let out by contract" work on a public road or building somehow involves the transfer of a property right in the road or building to a private contractor. In sum, we conclude that the term "let out by contract" in article II, section 29 means to award a contract to a private entity, under which the private entity would be compensated to perform work or fulfill a need. This definition does not involve the sale, rent, or lease of government property, nor does it involve relinquishment of a government property right in exchange for payment.

Most importantly, the language of the first clause of article II, section 29 cannot be interpreted independently; we must consider the provision in its entirety to determine its meaning. The second clause of article II, section 29 explains which systems of convict labor will be allowed. The clause states, "and the legislature shall by law provide for the working of convicts *for the benefit of the state.*" Const. art. II, § 29 (emphasis added). Thus, a reading of the two clauses together reveals that convict labor must be put to use "for the benefit of the state," *rather than* for the benefit of any "person, copartnership, company or corporation." Given the logical relationship between the two clauses of article II, section 29 and the contemporaneous trend toward allowing only public systems of convict labor that profit *only* the State, it seems clear that the founders intended to limit Washington to only the public systems of convict labor.

Territory should " 'take [prison labor] in charge instead of *letting it out by contract.*' " ***Water Jet*** I, 148 Wash.2d at 410, 61 P.3d 309 (quoting *Visit to the Territorial Penitentiary, LEWIS COUNTY NUGGET* (Chehalis), Aug. 4, 1883, at 1).

The dissent interprets the phrase "for the benefit of the state" broadly, as an explanation of the founders' reason for refusing to let the convicts sit idle. The dissent also argues that the founders chose to limit convict labor to that which benefits the State rather than limiting convicts to laboring only for the State. But the historical context surrounding the adoption of article II, section 29 undercuts any foundation for this interpretation. Such a reading simply does not account for the delegates' desire to limit direct competition with free labor and prohibit state favoritism toward chosen private enterprises. *See infra* part II C. Therefore, we conclude that the founders and ratifying public intended convict labor to profit the State, rather than private enterprise.[6]

C. Historical Context

"In determining the meaning of a constitutional provision, the intent of the framers, and the history of events and proceedings contemporaneous with its adoption may properly be considered." *Yelle,* 55 Wash.2d at 291, 347 P.2d 1081. Of course, there can be more than one purpose motivating a provision of the state constitution. *See, e.g., State v. Halstien,* 122 Wash.2d 109, 116-17, 857 P.2d 270 (1993). Where history suggests that there was more than one purpose behind a constitutional provision, logic dictates that the provision should be interpreted such that it satisfies each purpose.

When contemplating the issue of prison labor, Washington's founders had to balance several concerns, including the brutality associated with the lease system, the corruption and favoritism associated with private convict labor systems, and objections to convict labor's competition with free labor. The historical context surrounding the adoption of article II, section 29 reveals that the founders were particularly mindful of the impact of

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[6] Amici, including Private Industries in Prison Association, claim that because article II, section 29 is not located within the Washington Constitution's Declaration of Rights (Article I), it should not be interpreted to protect the interests of free labor or business. We disagree. While article II, section 29 limits the power of the State, we cannot ignore that the founders' intent, in part, was to prevent prison labor from competing directly with free labor.

prison labor on free labor and the problem of favoring one private enterprise over others with the benefit of prison labor. While the Department's interpretation of article II, section 29 addresses the humane treatment of prisoners, it fails to give proper weight to the founders' other concerns. Indeed, the Department would allow a system that embraces the very pitfalls that Washington's founders were hoping to avoid. We instead recognize that Washington's founders intended to address three concerns when they adopted article II, section 29: they intended to protect free workers from detrimental impacts of inmate labor on the local job market, they intended to protect local businesses from the unfair competition of prison run programs, and they intended to protect inmates from the cruelty of the lease system.

1. *Constitutional Convention*--The most convincing evidence that the impact of prison labor on free labor was a prevailing concern arises from reports of the constitutional convention itself. There is clear evidence that the delegates openly discussed the impact of prison labor on free labor. *Delegates Oppose Leasing the Services of Criminals to Corporations,* THE TACOMA DAILY LEDGER, Aug. 10, 1889, at 4. The *Tacoma Daily Ledger* article reveals the delegates' discomfort with allowing convict labor to be utilized by private entities. Yet it suggests relative support for using convict labor for public works. Referring to the committee members involved in the debate, the article notes, "Mr. Weir was opposed to leasing convict labor, or to bringing pauper labor in competition with honest workingmen." *Id.; see also* THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION: 1889, at 545 (Beverly Paulik Rosenow ed., 1999). T.M. Reed "thought convict labor was demoralizing to the laboring classes." LEDGER, *supra,* Aug. 10, 1889, at 4. "Mr. Prosser was also opposed to using convict labor." *Id.* Meanwhile, Mr. Buchanan stated that he "thought the convicts should be used on public works, and so did Mr. Lindsley." THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION: 1889, at 545. At the end of the debate, both clauses of section 29 remained: one forbidding convict labor for the benefit of private entities and the other mandating convict labor for the benefit of the State.

At the convention, President John Hoyt presented a petition from the local labor union requesting that the following provision be included in the constitution: "Convict labor shall not be employed in competition with free labor." *Suggestions from Tacoma,* LEDGER, *supra,* July 18, 1889, at 4. Hoyt shared this request only weeks before committee debates on article II, section 29. Thus, competition with the private sector was undoubtedly in the forefront of the committee members' minds as they entered the debate.

Amici, including Private Industries in Prison Association, claim that because the labor petition was not adopted, we cannot give article II, section 29 the precise meaning the framers refused to adopt. However, it is not surprising that the delegates rejected this provision in favor of the one actually adopted. If not, *all* prison labor would have been prohibited because even the public systems of prison labor compete *indirectly* with free labor industries. *See* FARRELL, *supra,* at 30. Of course, the fact that some delegates wanted prison labor to be used only on public works reveals that article II, section 29 represents a compromise. Article II, section 29 addresses labor concerns by preventing direct competition between prisoners and free laborers for particular jobs, but it does not prevent the sale of prison-made goods in the open market, so long as the goods are produced in a state-run program and profits benefit the State.

2. *Political Climate*--In the years immediately preceding Washington's constitutional convention, the political life of our emerging state was dominated by the populist movement, which strongly influenced Washington's constitution. Hugh Spitzer, *Washington Constitution's Suspicion of Big Business is Built-in,* SEATTLE POST-INTELLIGENCER, Nov. 19, 1997, at A15. Although Washington's Populist Party was not formalized until 1891, support for populist philosophies was strong throughout the 1880s. ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 11 (2002). By 1889, "a wave of populism lapped against the shores of Olympia as the constitution was drafted." *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wash.2d 413, 445, 780 P.2d 1282 (1989) (Utter, J., concurring).

Populism sprang primarily from agrarian roots and emphasized a philosophy of protection for small businesses and the working citizen. *Id.* Central among the populist ideals was the protection of the individual from unfair advantages created by coalitions between big government and politically connected big businesses. *See generally* James M. Dolliver, *Condemnation, Credit, and Corporations in Washington: 100 Years of Judicial Decisions--Have the Framers' Views Been Followed?*, 12 U. PUGET SOUND L.REV. 163 (1989). "The populists wished to protect personal, political, and economic rights from both the government and [big] corporations, and they strove to place strict limitations on the powers of both." Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L.REV. 491, 519 (1984). To achieve this, the populists strove to erect a "fire wall between the public and private sectors." Hugh Spitzer, *Washington's Constitution and How It Affects Us*, SEATTLE POST-INTELLIGENCER, Nov. 16, 1997, at E1. It was with this mindset that the framers drafted article II, section 29. Robert F. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 8 U. PUGET SOUND L.REV. 157, 178 (1985).

The national context in which Washington's populists were developing provided plentiful ammunition for a position that government should resist entanglement with private business. J.P. Morgan, John Rockefeller, and Andrew Carnegie had emerged as titans, and along with them came the perception that big business had somehow usurped government. MICHAEL KAZIN, THE POPULIST PERSUASION 31, 41- 42 (1995). National scandals in the 1870s like Credit Mobilier, Whiskey Ring, and the Belknap scandal, all of which involved entrepreneurs who abused political connections, would have added to the founders' populist sentiments. *See* RICHARD HOFSTADTER, THE AGE OF REFORM 71-75 (1955). 2 Thomas A. Bailey, David M. Kennedy & Lizabeth Cohen, The American Pageant, A History of the Republic 514-15 (11th ed.1998). Credit dependent and cash starved farmers blamed big business and the railroads for their financial difficulties. KAZIN, *supra*, at 38. Labor unions were all too aware that businesses relied on government to put down

strikes. *Id.* The populist movement was, in part, an attempt to strengthen government and restore its control to the people. *Id.* at 41-42. As a result, it would seem Washington's populists must have meant "for the benefit of the state" to mean that prison labor could not be used to benefit private industry.

3. *Labor Movement*--Meanwhile, at a national level, the labor movement's objections to convict labor were developing momentum. Although prison labor was heavily utilized throughout the nineteenth century, labor and business interests began to lobby against it in the 1880s and 1890s, claiming that "prison workers and the businesses that employed them had unfair advantages." Brian Hauck, *Prison Labor,* 37 HARV. J. ON LEGIS. 279, 281 (2000) (referencing Prison Industry Enhancement Certification Program Guidelines, 64 Fed.Reg. at 17,001); *see also* FARRELL, *supra,* at 98. Industry and an increasingly organized labor movement began to object to the sale of prison goods in the free market. A work on prisons published just three years before the adoption of our constitution states: "[T]he objection to convict labor, as now managed in most prisons, is that it is contracted out at such figures that the honest free laborers are reduced to starvation in the necessary competition which ensues...." JOHN P. ALTGELD, OUR PENAL MACHINERY AND ITS VICTIMS 111 (1886). At its first convention, the National Labor Union, a precursor to the Knights of Labor, advocated for a system of convict labor " 'which will least conflict with honest industry outside the prisons.' " FARRELL, *supra,* at 98. Thus, by the time the Washington State Constitutional Convention convened, convict labor had become increasingly controversial because of its impact on free labor. *Id.*

As a result, labor interests exerted a powerful influence over the creation and amendment of state convict labor provisions. FARRELL, *supra,* at 98-99. "The long-term and sustained efforts of free laborers and manufacturers, rather than the concerns of convict exploitation, led to the eventual abolition of private sector involvement in prison industry." Misrahi, *supra,* at 417; *see also* Garvey, *supra,* at 342 ("Prison labor disappeared primarily because organized labor unions and business organizations wanted to eliminate the competition."). The state-use system, which "obviate

[d] the objections of free labor and of manufacturers" came into prominence in the 1880s upon the decline of the contract system. FARRELL, *supra,* at 32.

In Washington, the 1880s were times of serious social upheaval, including labor unrest, as railroad expansion led to rapid urbanization and a population explosion. UTTER & SPITZER, *supra,* at 11. After the railroad's completion, wide scale unemployment generated additional tensions. MARY W. AVERY, HISTORY AND GOVERNMENT OF THE STATE OF WASHINGTON 197 (1961). The Knights of Labor gained considerable local popular support, and its People's Party won the Seattle mayoral election in 1886. *Id.* at 196. In the late 1880s, serious clashes between mine owners' private armies and mine workers in the Cascade coal fields ensured that labor issues influenced debate at the constitutional convention. CARLOS A. SCHWANTES, RADICAL HERITAGE: LABOR, SOCIALISM, AND REFORM IN WASHINGTON AND BRITISH COLUMBIA, 1885-1917, at 32 (1979). Two members of the convention directly represented labor: Matt J. M'Elroy, a logger, and William L. Newton, a coal miner. *Id.* One historian credits the two prolabor provisions--article II, section 29 and article I, section 24 (forbidding corporations from employing armed bodies of men)--directly to labor influence. *Id.* The additional impact of labor concerns upon the adoption of article II, section 29 is evidenced by the fact that the delegates to the constitutional convention openly discussed the impact of convict labor on free labor. *See supra* part II C 1.

4. *History of the Washington Prison System*--The populist distrust of government entanglement with private enterprise was likely enhanced by the experience of the Washington Territory's early prison labor systems. The Washington Territory originally housed its prisoners in county jails. *State Prison: A History of Adult Corrections in Washington,* PERSPECTIVE, Spring--Summer 1966, at 5 (hereinafter *State Prison*). However, the legislature soon recognized the need to provide a central facility and entered into a contract with William Billings, the sheriff of Thurston County, to take custody of all of the convicts in one location. *Id.* at 6. Billings agreed to build a territorial prison in

exchange for a maintenance allowance for each convict and the right to use their labor. *Id.* Under Billings' supervision, the convicts worked at logging, coal mining, and barrel-making. *Id.* at 7. There was criticism of the Billings contract at the outset because the territorial legislature had conferred " 'a special privilege to the fullest extent.' " *Water Jet* I, 148 Wash.2d at 414, 61 P.3d 309 (quoting *In a Quandry,* WASHINGTON STANDARD (Olympia), Nov. 24, 1877, at 1). Indeed, the contract proved to be quite profitable for Billings and his associates. *State Prison, supra,* at 7. They enjoyed large profits as a result of their contract with the State, a contract which was granted to them at least in part because of their political influence. *Id.* at 6. Moreover, there is some suggestion that Billings failed to pay the territorial government its share of the convicts' wages. UTTER & SPITZER, *supra,* at 67.

In 1886, the territorial government decided to abandon the Billings contract and the "free enterprise" prison system and take over the supervision of prisoners itself. *State Prison, supra,* at 7. The territorial government then built a new penitentiary in Walla Walla to be managed by the State. *Id.; see also* MESSAGES OF THE GOVERNORS OF THE TERRITORY OF WASHINGTON TO THE LEGISLATIVE ASSEMBLY, 1854-1889, at 250 (Charles M. Gates ed., 1940).

Territory officials recognized the need to provide work for the convicts and defray the costs of the penitentiary, while also striving to prevent competition with free labor and state favoritism of one private enterprise over another. The prisoners at the Walla Walla penitentiary were first put to work making bricks for the State. *State Prison, supra,* at 11. The commissioners later recommended expanding the prison's brick-making enterprise because, among other reasons, "no industry or institution would be materially injured thereby." *The Walla Walla Prison: The Commissioners' Report to the Governor,* THE TACOMA DAILY LEDGER, Nov. 27, 1889, at 2 (hereinafter *Commissioners' Report*). An 1887 superintendent's report to the territorial governor discussed the need to provide work for the convicts in his care and suggested burlap bag manufacturing, by way of a state-run jute mill, because it "would in no [sic] come in competiion [sic] with any local enterprise." WASHINGTON STATE PENITENTIARY,

SUPERINTENDENT'S REPORT TO THE GOVERNOR AND LEGISLATIVE ASSEMBLY OF WASHINGTON TERRITORY 8 (SUPP.1887). Furthermore, a letter from the commissioners of the Walla Walla penitentiary states that "we at once took into consideration the best means of employing the convicts to the benefit of the penitentiary, and at the same time not injure local industries." *Commissioners' Report, supra,* at 1. Although territory officials recognized the need to provide some sort of work for convicts, they were also hesitant to provide work that might compete directly with local businesses and free labor.

In the years immediately following the adoption of article II, section 29, state officials continued to limit prison labor to public, rather than private systems. In 1891, Acting Governor Charles Laughton himself recommended to the legislature that the State establish a jute bag factory in the Walla Walla penitentiary. Governor Laughton wanted "constant employment [to] be furnished to prisoners" for the purpose of reducing the net cost of the penitentiary while benefiting the prisoners themselves. State of Wash., Gov. Chas. E. Laughton, *Message to the Legislature,* at 45 (1891). Governor Laughton assured that:

> The Penitentiary is situated in the center of one of the richest grain-producing regions in the United States, if not in the whole world, where the labor of the convicts for the purposes suggested would in no wise enter into competition with the free labor of the citizen.

Id. Laughton subsequently submitted to the legislature several reports from Washington prison commissioners analyzing the feasibility of a jute bag factory. Letter from Governor Laughton to the President of the Senate (Jan. 28, 1891) (accompanying the SUPPLEMENTAL REPORT OF PRISON COMMISSIONERS 1891). Those reports reflected the success of a comparable prison factory in California. SUPPLEMENTAL REPORT OF PRISON COMMISSIONERS, *supra,* at 15-16 (quoting Letter from Warden's Office, State Prison, San Quentin, Cal., (July 12, 1890)). The reports took care to note that jute bags were currently obtained only from East India or Scotland. *Id.* at

15. In fact, the California prison directors also chose the jute bag factory "because of its non-competition with free white labor." *Id.* at 16.

Therefore, the impact on free labor remained a constant concern, and when developing a labor system at the Walla Walla prison, early state officials acted as if article II, section 29 prohibited all private systems of prison labor. Although the 1927 and 1943 legislatures interpreted article II, section 29 to prohibit the contract system of labor, *Water Jet* I, 148 Wash.2d at 423-24, 61 P.3d 309, the actions of Washington's officials immediately after the adoption of article II, section 29 are undoubtedly more reflective of the founders' meaning.

5. *Conclusions*--While we agree with the Department that Washington's founders would not have contemplated a system identical to the Class I Free Venture Industries system, it is evident that the delegates intended (1) to prevent prison labor from displacing free labor, and (2) to prevent the State from favoring one business over another with the benefits of inmate labor when they adopted article II, section 29. The plain language of article II, section 29 reflects that labor for the benefit of the State is mandated, while labor for the benefit of a private enterprise is prohibited. If indeed the delegates also intended to mandate a humane prison labor system, that problem was also solved because article II, section 29 allowed only state control over prison working conditions.

However, reading article II, section 29 to outlaw only the contract and lease systems of convict labor, as the Department suggests, does not protect against the very shortcomings that Washington's founders were trying to avoid. The Department's interpretation allows private enterprise to choose prison labor over free labor. It also allows the State to favor one private entity over its competitors with the benefits of prison labor. These are the very problems that Washington's founders intended to protect against when they adopted article II, section 29.

D. *Other States' Interpretations of Similar Constitutional Provisions*

Because Washington courts have not previously interpreted article II, section 29, it is appropriate to turn to other states with similar constitutional provisions for guidance. *See Waremart, Inc. v. Progressive Campaigns, Inc.*, 139 Wash.2d 623, 638-39, 989 P.2d 524 (1999). The cases in this section are particularly instructive because they interpret constitutional language that served as a basis for, or is nearly identical to, our own.

1. *California*--The California State Constitution provides: " 'The labor of convicts shall not be let out by contract to any person, copartnership, company or corporation, and the Legislature shall, by law, provide for the working of convicts for the benefit of the State.' " *Pitts v. Reagan,* 14 Cal.App.3d 112, 115, 92 Cal.Rptr. 27 (1971) (quoting CAL. CONST. art. X, § 1 (formerly art. X, § 6, *repealed* 1960)). In addition to the parity in language, legal scholars have recognized the influence California's constitution had in the formation of Washington's constitution. *See* Dolliver, *supra,* at 170 (citing ARTHUR S. BEARDSLEY, SOURCES OF THE WASHINGTON STATE CONSTITUTION, *reprinted in* 1987-88 WASHINGTON LEGISLATIVE MANUAL 362 (1987)). California's constitutional convention was held only a decade prior to Washington's, in a similar political climate where a strikingly similar debate arose. *See Pitts,* 14 Cal.App.3d at 118, 92 Cal.Rptr. 27. For example, when a motion was made to strike the language, " '[t]he labor of convicts shall not be let out by contract to any person, copartnership, company or corporation,' " several representatives spoke in favor of its retention: " '[i]t is a burden upon free laborers for the State to contract the labor of these prisoners' "; " 'a very great evil is that it brings this prison labor in competition with free white labor' "; and " '[t]he interests of the laboring classes are directly in conflict with the interest of those who employ contract labor.' " *Id.* at 118-19, 92 Cal.Rptr. 27 (quoting Delegates Condon, Freud, and Beerstecher). The comments from Washington delegates echoed these same sentiments only 10 years later. California's interpretation of its article X, section 1 is therefore instructive when interpreting our

article II, section 29.

In *Pitts,* the California court of appeals interpreted the effect of its constitution's convict labor clause on an "Emergency Harvest Program," under which convict labor was used for harvesting privately owned crops during periods of alleged labor shortages. *Id.* at 114-15, 92 Cal.Rptr. 27. The court concluded, "[T]he instant language of article X, section 1, is intended in the broader sense--that the state may not let out convict labor by contract to private employers regardless of whether the state or the convicts or both receive the attendant consideration." *Id.* at 117-18, 92 Cal.Rptr. 27. It did not matter to the court whether the convicts consented or that they were paid "going wages." *Id.* at 118, 92 Cal.Rptr. 27. Rather, the court was concerned with the *competition* with the private sector that the use of convict labor presented, stating:

> Little imagination is required to visualize the effects of convicts in this manner competing in the state's labor market. And there would seem little doubt that the terse words of article X, section 1, "The labor of convicts shall not be let out by contract" to private persons were not intended to allow such a practice.

Id. at 118, 92 Cal.Rptr. 27.

The dissent argues that the *Pitts* court invalidated the labor program at issue because there were no contracts between the growers and the prisoners, only between the growers and the State. Although the *Pitts* court noted that "[t]here were no individual contracts between the growers and the prisoners," *id.* at 116, 92 Cal.Rptr. 27, there is no indication that this was the basis for its holding. Furthermore, the dissent implies that because the *Pitts* court stated that a "convict may himself sell or hire out his services to a private person," *id.* at 117, 92 Cal.Rptr. 27, the court would have validated our Class I industries. However, this ignores the critical problem recognized by the *Pitts* court, namely that there was a contract between the state and private entities, just as there must be in our Class I industries program. The *Pitts* court defined

the issue before it as "whether the state, without profit or consideration to itself, is permitted by article X, section 1, to furnish convict labor to private individuals or organizations under contract or other agreement." *Id.* There is no indication in that statement that the court was particularly concerned with whether there were contracts between the convicts and the private enterprise. In addition, the California court held that the Emergency Harvest Program violated article X, section 1, despite the fact that California did not sell, lease, or rent convict labor. Therefore, the *Pitts* opinion clearly does not support the Department's interpretation of the phrase "let out by contract."

The facts of *Pitts* are quite similar to those before us. In both instances, prison labor is being utilized by a private industry by virtue of a contract with the State. In fact, allowing prisoners to harvest fruit during a labor shortage is arguably more beneficial to the State than the MicroJet contract at issue here. Given the closeness in the timing of the adoption of our states' constitutions and the nearly identical language of the provisions, the California court's conclusion is particularly persuasive.

A 1980 California attorney general opinion discussed whether California's work furlough system was prohibited by the section of the California Constitution interpreted in *Pitts*. The opinion concluded that California's furlough system was permissible because "the state is not providing the labor by contract with the employer." 63 Ops. Cal. Att'y Gen. No. 79-1016, at 33, 36 (1980). Under the California system, the work furlough administrator does not contract for the prisoner's employment, he merely assists in finding employment for the prisoner. *Id.* Of course, Washington's Class I Free Venture Industries system is critically different from California's furlough system. RCW 72.09.100(1). Here, the State does not merely help the prisoner to find employment in the open job market; it contracts with a private enterprise to manufacture its product within the prison and to employ prisoners. Therefore, the California attorney general's opinion does not contradict our conclusion that the State cannot grant the benefit of prison labor by contract.

2. *Illinois*--A similar provision in the Illinois constitution mirrors our own. BEARDSLEY, *supra,* at 376. In fact, when drafting article II, section 29, Washington delegates were particularly influenced by the Illinois constitution. *Bond v. Burrows,* 103 Wash.2d 153, 157-58, 690 P.2d 1168 (1984); JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, *supra,* at 545 n. 53 (citing ILL. CONST. 1870 (Amendment of 1886)); BEARDSLEY, *supra,* at 376. The fourth amendment to the Illinois State Constitution states, " 'Hereinafter it shall be unlawful for the commissioners of any penitentiary, or other reformatory institution in the State of Illinois, to let by contract to any person, or persons, or corporations, the labor of any convict confined within said institution.' " *K. & S. Mfg. Co. v. Illinois,* 7 Ill. Ct. Cl. 107, 108-09 (1932) (quoting Ill. Const. (amend.4)). This amendment became effective in 1886 after organized labor staged a successful boycott of prison-made goods, echoing labor influence in Washington during the time of our constitutional convention. *See* Blake McKelvey, *The Prison Labor Problem: 1875-1900,* 25 J.Crim. L. & Criminology 254, 256 n. 6 (1934).

In 1903, Illinois enacted legislation that reflected the language of its constitution, but permitted prisoners to work under certain conditions. *See K. & S. Mfg.,* 7 Ill. Ct. Cl. at 110. Section 5 of the 1903 Illinois Act to Regulate the Employment of Convicts and Prisoners provided that the board of prison industries,

> "shall not ... make any contract by which the labor or time of any prisoner or convict in any penitentiary or reformatory of this State or the product or profit of his work shall be contracted, let, farmed out, given or sold to any person, firm, association or corporation; except that said prisoners or convicts in said penal or reformatory institutions may work for, and the products of their labor may be disposed of to the State, or for or to any public institution owned or managed and controlled by the State."

Id. (quoting 1903 Act, § 5, *repealed by* 730 Ill. Comp. Stat. 5/8-5-1 (Jan. 1, 1973)). This section resembles the "public benefit" clause of article II, section 29 of the Washington State Constitution and thus sheds additional light on the interpretation of our own provision.

In *K. & S. Manufacturing,* a manufacturing company sought damages arising from a contract with the department of public welfare for the manufacture of furniture at the Stateville prison. *Id.* at 107-08. Upon interpreting the fourth amendment to the Illinois Constitution, the state court of claims[7] responded: "[t]he language of this provision is plain, and its purpose can not be misunderstood. It was intended to prevent prison labor from entering into competition with free labor." *Id.* at 109. The court unequivocally recognized: "Any contract the effect of which is to let the labor of the prisoners is in violation of this clause of the Constitution and wholly void, and no cause of action can be based upon it." *Id.*

Supplementing its interpretation of the fourth amendment, the Illinois court found the 1903 law to be "in harmony with the letter and spirit of the fourth amendment to the Constitution." *Id.* at 111. Thus, convict labor could permissibly be used for the benefit of the State, so long as prison labor did not compete with the private market:

> It is clear ... that the intention of the legislature was to prevent the competition of prison labor with free labor; that it intended the prisoners should be employed in such work and in the manufacture of such articles as could be used

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[7] The Illinois Court of Claims has exclusive jurisdiction over most claims against the State. The court consists of judges and a chief justice appointed by the governor and confirmed by the senate. 2000 Illinois Court of Claims Rules and Statutes, Summary of Jurisdiction at iv; *see also* Illinois Court of Claims, Judges & Commissioners, *available at www.sos.state.il.us./departments/court--of--claims/judges.html* (last visited Apr. 30, 2004). Therefore, the court's interpretation of similar Illinois law, while by no means dispositive, can be instructive in our interpretation of article II, section 29.

> by the State, the institutions of the State and the school and road districts of the State so that the products of their labor would not enter into [sic] goods sold on the open market to the general public.

Id. As with the *Pitts* case from California, the Illinois court's reasoning is persuasive and supports our conclusion that the Department's program, though legislatively authorized, violates the Washington Constitution.

3. *Other States*--The Department cites case law from New York, Utah, and Oklahoma to support its contention that Washington's article II, section 29 prohibits *only* the contract system of prison labor because, under the Department's reasoning, the term "let out by contract" refers only to the practice of selling, renting, or leasing the labor of prisoners. In addition, the dissent cites to other cases for the proposition that article II, section 29 only prohibits the State from selling, renting, or leasing convict labor. However, it is clear that none of these cases interprets language like article II, section 29's to mean that the State can grant the benefit of convict labor to a private enterprise. In fact, several of the sources cited reflect a preference, if not a mandate, for the public systems of prison labor.

The Department cites *People v. Hawkins*, 157 N.Y. 1, 51 N.E. 257 (1898). The *Hawkins* court interpreted the New York Constitution to allow convict-made goods to be sold to the general public, so long as convict labor is not " 'farmed out, contracted, given or sold to any person, firm, association or corporation.' " *Id.* at 12, 51 N.E. 257 (quoting N.Y. CONST. 1894, art. 3, § 29). Although the court noted that the constitution "simply abolished ... the contract system of labor in prisons," it did so because "the profits of the labor of convicts were secured by contractors or private parties." *Id.* at 13, 51 N.E. 257. Therefore, the *Hawkins* court recognized that goods made in a state-run prison labor system could be sold to the general public because the profit would benefit the State, rather than private enterprise.

The Department also cites *Utah Manufactures' Ass'n v. Mabey,* 63 Utah 374, 226 P. 189 (1924), claiming that the Utah Supreme Court clearly understood "contracting" to mean the contract system of convict labor. However, the Utah court has clearly drawn a distinction between permissible state-run labor programs and impermissible private systems. In *Utah Manufacturers',* the court concluded that a *state-run* program did not have "any of the elements of 'contracting convict labor,' " and therefore did not violate Utah's constitution. *Id.* at 189. The *Utah Manufacturers'* court distinguished a case that had been decided the year before involving a convict work program in which a private company provided the materials, machinery, and supervision while the prison provided the labor of the convicts, the manufacturing space, and the utilities. *Id.* at 189-90 (discussing *Price v. Mabey,* 62 Utah 196, 218 P. 724 (1923)). The *Price* court invalidated that program, finding that it was "in its essence a contract for the hiring of prison labor." *Price,* 218 P. at 727. The holdings in *Utah Manufacturers'* and *Price* thus do not conflict with our holding today.

The Department also refers to *Rice v. State,* 108 Okla. 4, 232 P. 807 (1924), which involved a shirt factory within a penitentiary that was operated by the State. The Department maintains that *Rice* rejected only the lease and contract systems of labor. However, like *Utah Manufacturers',* this case concerned whether or not the state-run business was for public, rather than private, purposes. *Id.* at 810. The court merely addressed whether convict-made goods could be sold on the open market, even though they might compete indirectly with goods produced by free labor. The *Rice* court found that the state-run program was constitutional, stating:

> [I]t is necessary that those confined be employed.... The fact that such employment may produce a commodity to be sold on the market in competition with goods produced by free labor *does not render the purpose a private one.*

> *The state is entitled to the labor and service of its convicts* while confined in its prisons, and has the authority to produce by such labor things of commercial value.

Id. at 810 (emphasis added). Thus, the *Rice* court in no way endorsed prison labor programs that would benefit private enterprise or compete with free laborers. *See also Sibel v. State Bd. of Pub. Affairs*, 206 Ok. 433, 244 P.2d 307, 308 (1952) (authorizing the construction of a bookbinding facility within a state penitentiary, to be used only " 'by departments, institutions and agencies of the State and its political subdivisions.' " (quoting Okla. Stat. tit. 74, § 123 (1951))).

Thus, the Department seems to ignore the ultimate holdings of *Hawkins, Utah Manufacturers'*, and *Rice*, asserting that the cases support prohibition of *only* the contract system of convict labor. In contrast, these cases all reflect that, as long as a prison work program is one of the *public* systems, the applicable state constitutional provisions do not prohibit them.

Some of the additional cases cited by the dissent merely refer to, define, or describe specific contracts or the contract system of labor in general. *See, e.g., Nugent v. State of Arizona Imp. Co.*, 173 U.S. 338, 338-42, 19 S.Ct. 461, 43 L.Ed. 721 (1899). Others establish only that prisoners were not parties to contracts between states and private enterprises under the contract system of labor. *See, e.g., Thompson v. Bronk*, 126 Mich. 455, 85 N.W. 1084 (1901). Because the characteristics of the contract system are not disputed, the relevance of these cases is questionable. The relevance of *Walton County v. Franklin*, 95 Ga. 538, 538, 22 S.E. 279 (1894) is also in doubt because the *Walton* court merely noted that county authorities could no longer hire out convicts to a private individual, without discussion of the relevant statutory language.

However, several of the cases cited by the dissent actually reflect the trend that states were beginning to allow only public systems of prison labor, while prohibiting private systems. These cases would not conflict with our reading of article II, section 29.

See, e.g., State ex rel. Davis v. Mortensen, 69 Neb. 376, 384, 95 N.W. 831 (1903) (noting Nebraska's plan to "eventually provide means for the employment of all prisoners without the intervention of contractors"); *Ove Gnatt Co. v. Jackson*, 205 Ind. 51, 56, 184 N.E. 553 (1933) (Treanor, J.) (allowing goods produced on a state run farm to be sold on the open market and noting "[i]t has also been the policy of the General Assembly to abolish contract labor *... and to substitute therefor the manufacture of goods on state account.*" (Emphasis added.)); *State ex rel. Greaves v. Henry*, 87 Miss. 125, 40 So. 152, 155-56, 159 (1906) (noting that the Mississippi Constitution allowed inmates to work on public works projects or on state-run farms but only under state supervision).

In sum, the California and Illinois courts have interpreted comparable constitutional provisions to prohibit private systems of convict labor that benefit private enterprise. The holdings from New York, Utah, Oklahoma, and other states are not in conflict because they do not speak to a prohibition comparable to the one adopted in Washington, or they allow public, rather than private, systems to continue in those states.

III
Application of Article II, Section 29 to the Class I Free Venture Industries Program

We must evaluate the Class I Free Venture Industries program in light of the plain meaning of article II, section 29 and the purposes motivating its adoption. Under the Class I program, the benefit of prison labor is granted to a private enterprise by virtue of a contract with the State. RCW 72.09.100(1). Although the prisoners work voluntarily under contracts like MicroJet's, they may not freely choose to work instead for one of MicroJet's competitors. The company enjoys additional benefits, including a rent-free facility and significantly reduced overhead costs. Most importantly, the prison workers are employed in positions that companies like MicroJet would otherwise have to fill with free workers. Thus, the Class I program engenders the exact problems that Washington's founders intended to avoid by adopting article II, section 29.

Ultimately, the Class I system lets out prison labor by contract for the benefit of a private company or corporation in direct contravention of article II, section 29. RCW 72.09.100(1) unconstitutionally endorses this private system of convict labor. Because RCW 72.09.100(1) is itself unconstitutional, deference to the legislature cannot save it.

The benefits of providing employment opportunities for convicts are not in dispute. Even though Class I industries are unconstitutional, there remain four valid classes of inmate work programs under RCW 72.09.100(2)-(5),[8] which are clearly state operated systems. Work release programs as established in chapter 72.65 RCW also remain.[9] The Class I industries program at issue in this case is different from all of these permissible programs because Class I involves a contract for convict labor between a private enterprise and the State, for the benefit of the private enterprise. Therefore, we overrule *Water Jet* I, 148 Wash.2d 403, 61 P.3d 309, to the extent that it is inconsistent with this opinion.

IV
Claims Against Kenneth and Sharon Piel

Water Jet also named the owners of MicroJet, Kenneth and Sharon Piel, as defendants, although it did not claim a specific wrongdoing against the Piels. These claims were involuntarily dismissed by the trial court. Water Jet had an opportunity to submit facts that would show that the corporate form had been

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[8] The four additional inmate work programs are Class II: Tax Reduction Industries, RCW 72.09.100(2); Class III: Institutional Support Industries, RCW 72.09.100(3); Class IV: Community Work Industries, RCW 72.09.100(4); Class V: Community Restitution Programs, RCW 72.09.100(5). All of these programs must be operated by or under the supervision of the Department and therefore do not run afoul of our constitution.

[9] The work release program is also distinguishable because work release residents are not limited to a single employer within a particular industry; they must find work in the open labor market.

abused and that disregarding the corporate entity was justified. It failed to do so.

To pierce the corporate veil and reach the Piels, Water Jet must demonstrate that the corporate form was used to violate or evade a duty, and that it must be disregarded to prevent loss to an innocent party. *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wash.2d 403, 409-10, 645 P.2d 689 (1982). Courts in other states have dismissed similar arguments on a motion to dismiss for failure to state a claim. *See First Realvest, Inc. v. Avery Builders, Inc.*, 410 Pa.Super. 572, 600 A.2d 601, 604 (1991). We conclude that dismissal was appropriate here as well.

V
Conclusion

Upon reconsideration, we are constrained to conclude that RCW 72.09.100(1) directly conflicts with article II, section 29 of the Washington Constitution. However, we emphasize that the laudable public policy goals that prompted the legislature to adopt RCW 72.09.100(1) can be met through alternative, state-run programs. We also conclude that the trial court's dismissal of the claims against the Piels was appropriate. We affirm *Water Jet* I's dismissal of the plaintiffs' claims based on the Ashurst-Sumners Act, 18 U.S.C. § 1761, and 42 U.S.C § 1983. *Water Jet* I, 148 Wash.2d at 427, 61 P.3d 309. In sum, we overrule *Water Jet* I, 148 Wash.2d 403, 61 P.3d 309, to the extent that it is inconsistent with this opinion and remand to the trial court for further proceedings consistent with this opinion.

ALEXANDER, C.J., and JOHNSON, and MADSEN, JJ., and KATO, J. Pro Tem., concur.

CHAMBERS, J., (dissenting).

After due deliberation, our founders renounced a significant commodity; the State's historical power to *sell* the involuntary labor of prisoners on the open market. Today, we must decide whether our founders incidentally prohibited prisoners from entering into *employment relationships* with private entities,

a labor relationship unheard of in the nineteenth century. Because we conclude that article II, section 29 of the Washington Constitution did not contemplate, let alone forbid, *private employment* of prisoners, we dissent.

ANALYSIS

History is critical to our analysis because we interpret constitutional terms as they would have been commonly understood at the time of their promulgation. *See State v. Brunn*, 22 Wash.2d 120, 139, 154 P.2d 826 (1945); *State ex rel. Pub. Util. Dist. No. 1 of Skagit County v. Wylie*, 28 Wash.2d 113, 127, 182 P.2d 706 (1947). Our initial task is to determine how "let out by contract" would have been understood in 1889. The majority canvasses the dictionary definitions, and briefly surveys the different modes of convict labor in the late nineteenth century. While scholarly, the majority overlooks a key historical fact: the founders did not consider the prisoners' right to contract *privately* for their own labor because, at the time, prisoners had no legal capacity to so contract. Under the prevailing law of the time, the State itself owned the prisoners' labor. *See* E. STAGG WHITIN, PENAL SERVITUDE, at i (1912) ("The State has a *property right* in the labor of the prisoner.... This property right the state may lease or retain for its own use, the manner being set forth in state constitutions and acts of legislatures." (emphasis added)). This property right in the labor of prisoners, now largely abandoned by the march of history, *cf.* U.S. CONST. amend. XIII, lay underneath each of the five models of prison labor properly cataloged, but not properly contextualized, by the majority.

The majority surveys many contemporary definitions of the terms of article II, section 29. Again, properly read, underlying all of these definitions is the principle that "to let out by contract," historically, referred to a contractual mechanism, however labeled, whereby some commodity, service, or project controlled by one entity would be contracted to another. As the majority notes, one contemporaneous dictionary defined "let" in part as "[t]o lease or demise for rent or other consideration; put to hire or rent; grant or assign, as to an applicant; frequently followed by *out;* as to *let* a contract." A STANDARD DICTIONARY OF THE ENGLISH

LANGUAGE 1021 (Issac K. Funk et al. eds., 1897); *see also* majority at 47.[10] Properly read, this definition is in accord with the historical fact underlying article II, section 29.

While our language has changed somewhat over the last 100 years, to "let out" an apartment is still to rent an apartment. *E.g., Cole v. McKey,* 66 Wis. 500, 29 N.W. 279, 281 (1886) ("the defendant *let out* his house, in apartments, to several tenants" (emphasis added)); *see also Gowen v. Phil. Exch. Co.,* 1843 WL 5003, at *3, 40 Am. Dec. 489, 5 Watts & Serg. 141 (Pa.1843) ("Its apartments are *let* for balls, concerts, lectures, auctions, exhibitions, and other purposes ...." (emphasis added)).

Similarly, to "let out" a contract to build a road is to submit the contract out to bid, *see, e.g.,* majority at 48 (citing *Giffin v. King County,* 50 Wash. 327, 329, 97 P. 230 (1908)), just as to "let out" a contract to build a university building is to submit that contract out for bid, RCW 28B.20.140 (originally enacted by LAWS OF 1909, ch. 97, § 9).

And to "let out" the labor of convicts by contract is to sell, lease, rent, or contract out the State's property right in convict labor to a private party. CONST. art. II, § 29. The majority cites sound sources. It draws the wrong conclusion from them.

The majority's conclusion that "for the benefit of the state" means something is correct. Majority at 48-49. The majority's

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[10] Other historical dictionary definitions are in accord. One defines "let" as: "To grant possession and use for a compensation; to lease; as, to *let* an estate for a year; to *let* a room for lodgers;-- *often followed by out.*" Noah Webster, *American Dictionary of the English Language* 766 (Chancey A. Goodrich & Noah Porter, rev. ed. 1899) (emphasis added); *accord* Noah Webster, *American Dictionary of the English Language* 659 (Chancey A. Goodrich, rev. ed. 1853) ("To lease; to grant possession and use for a compensation; as, to *let* to farm; to *let* an estate for a year; to *let* a room to lodgers; often followed by *out,* as, to *let out* a farm."). Another defines "let" in this context as " '[t]o award to one of several persons, who have submitted proposals therefor, the contract for ... rendering some ... service to government for a stipulated compensation.' " Majority at 47 (quoting 2 HENRY CAMPBELL BLACK, A DICTIONARY OF LAW 708 (1891)).

implied holding that it means that no entity *but* the state government may benefit from convict labor is unsupported. The 1899 dictionary definition of "benefit" is quite broad: "Whatever contributes to promote prosperity and personal happiness, or adds value to property; advantage: profit." Noah Webster, *American Dictionary of the English Language* 125 (Chancey A. Goodrich & Noah Porter, rev. ed. 1899). By the time of our constitutional convention, "it had become recognized, and was so recognized by all students interested in the reformation of prisoners, that regular labor of some kind was necessary and essential for order within the prison walls." *Utah Mfrs.' Ass'n v. Mabey*, 63 Utah 374, 226 P. 189, 189 (1924). Put another way, it was recognized that work itself would benefit the State. This benefit "cannot be estimated in dollars and cents as is shown by all the best penologists of the day." State of Wash., *Annual Report of the Penitentiary Commissioners* 4 (1890) (reviewing the benefit to the State of prison labor). Providing useful work benefits the State through reducing the cost of corrections, providing useful skills, and, as recognized from the earliest days of our State, providing "great benefit from a mental, moral and physical standpoint." State of Wash., Gov. Chas. E. Laughton, *Message to the Washington Legislature* 45 (1891).

The majority holds that "it seems clear" that article II, section 29 was "intended to limit Washington to only the public systems of convict labor." Majority at 48. We disagree. There is considerable evidence that article II, section 29 was a compromise struck by our founders (like those negotiated across the nation at the time) between different interest groups to ameliorate the "antecedent mischief" of convict contract labor. Although some did believe that the problem with convict contract labor was unfair competition, *see Convict Labor, Delegates Oppose Leasing the Services of Criminals to Corporations,* TACOMA DAILY LEDGER, Aug. 10, 1889, at 4 (*available in Washington State Constitutional Convention 1889: Contemporary Newspaper Articles* at 4-85 (Penny A. Hazelton ed., 1998)), others believed the problem was the government and the corporate corruption it caused. *E.g.,* WHITIN, *supra,* at 6; James Leonard Fitts, *The Washington Convention of 1889,* at 95 (1951). Yet others abhorred the inhumane conditions that often accompanied this

form of forced labor. *See generally* Neil B. Corcoran, *Bucoda A Heritage of Sawdust and Leg Irons* 24-26 (1976); *The Penitentiary,* SEATTLE WEEKLY CHRONICLE, Oct. 4, 1883, at 4 (criticizing the contract system at an early Washington prison as "system wrong in principle, and doubly so in practice. It opens the door for the entrance of personal greed of gain, cruelty and neglect of men so kept."); *see also* UNITED STATES INDUSTRIAL COMMISSION, REPORT OF THE INDUSTRIAL COMMISSION ON PRISON LABOR 6-8 (1900) (hereinafter REPORT ON PRISON LABOR).

Against this backdrop of considerable antecedent mischief wrecked by convict contract labor, our constitutional convention reached a compromise. It declared that "[T]he labor of convicts of this state shall not be let out by contract." CONST. art. II, § 29. It forbade the State from selling the commodity of contract labor and provided that convicts should work for the benefit of the State. Nowhere in the constitution did our founders mandate the creation of a public use system, and only a public use system. The term was well known; such a thing would have been quite easy. If the abolition of convict labor in competition with free labor had been the compromise, the language suggested by labor to accomplished that goal would have been adopted. *See* TACOMA DAILY LEDGER, July 18, 1889, at 4 (*available in Washington State Constitutional Convention 1889, supra,* at 4-24) (discussing suggested language providing: "Convict labor shall not be employed in competition with free labor."). The fact the drafters rejected the labor advocates' language is significant. *State ex rel. Gallwey v. Grimm,* 146 Wash.2d 445, 464-65, 48 P.3d 274 (2002) (court may consider language rejected by the constitutional convention in determining meaning).

The majority does note the different concerns that prompted article II, section 29. Majority at 49. But the majority finds that competition with the private sector was somehow more equal than the other concerns, apparently because of the proximity in time of a specific labor union's request that convict contract labor be addressed in the new constitution. Majority at 49-50. This overstates the evidence. First, the concern was hardly a surprise; organized labor across the nation had been fighting

convict contract labor for decades at the time of our constitutional convention. WILLIAM J. FARRELL, PRISONS, WORK AND PUNISHMENT 32, 98 (1994); Blake McKelvey, *The Prison Labor Problem:* 1875-1900, 25 J, AM. INST.CRIM. L. & CRIMINOLOGY 268 (1925); WHITIN, *supra,* at 7; majority at 51. Our founders were well acquainted with labor's concerns. Second, the progressive opposition to convict contract labor had been growing for decades and there was a strongly progressive streak in our State at that time. *See, e.g.,* Theodore Roosevelt, *The New Penology, in* AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, THE ANNALS: PRISON LABOR 4-5 (1913) (by 1913 an explicit part of the progressive platform was the abolition of the convict contract labor system); 1 HERBERT HUNT & FLOYD C. KAYLOR, WASHINGTON WEST OF THE CASCADES 359 (1917); majority at 50-51. Third, there was growing awareness of the terrible corruption endemic in the sale of the State's power to force labor. Majority at 52; *see generally* Wash. State Dep't of Inst., *State Prison--A History of Adult Corrections in Washington, Perspective* 5-7 (Spring Summer 1966); REPORT ON PRISON LABOR, *supra,* at 32; FARRELL, *supra,* at 93; *cf.* majority at 51. All these concerns went into the final compromise. We have no reason to believe labor's concerns were so overriding in the minds of our founders that the words of the constitution must give way.

Properly understood, the overwhelming case authority from other states also undermines the majority's historical interpretation. We disagree with the majority's analysis of the California Court of Appeals' decision in *Pitts v. Reagan,* 14 Cal.App.3d 112, 92 Cal.Rptr. 27 (1971). *See* majority at 53-54. Key to the California court's holding was the fact that, in effect, the State let out the labor of convicts by contract. "There were no individual contracts between the growers and the prisoners. Such contracts as existed were ... between the growers and state officials." *Pitts,* 14 Cal.App.3d at 116, 92 Cal.Rptr. 27. The California court properly concluded that this was precisely what the California State Constitution prohibited.

Further, the *Pitts* court stated, and all parties agreed, that a "convict may himself *sell or hire out his services to a private*

person, and that parole or other state officials may assist in such rehabilitative efforts." *Pitts,* 14 Cal.App.3d at 117, 92 Cal.Rptr. 27 (emphasis added).[11] This accurately describes our Class I industries.

We agree with the majority that, in general, we pay particular attention to the Illinois Constitution, and we recognize that the interpretation of the Court of Claims is contrary to our interpretation. Majority at 55-56 (citing *K. & S. Mfg. Co. v. Illinois,* 7 Ill. Ct. Cl. 107 (1932)). But the Court of Claims is a department of the Illinois Secretary of State's Office, not an appellate court. *See* Illinois Court of Claims, *About the Department of Court of Claims, available at www.sos.state.il.us/depts/claims/about.htm* (last visited May 4, 2004). A hard look at the *K. & S.* opinion reveals that it is much less about the constitution, and much more about a 1903 statute that did exactly what the majority says our constitution did; it banned competition. *K. & S.,* 7 Ill. Ct. Cl. at 107. Courts decide cases on statutory grounds if possible; in *K. & S.,* the court reached the right decision under Illinois law. If the Court of Claims were an actual court, rather than effectively a branch of the executive,

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[11] As further support, the opinion has been interpreted in California the same way by the California Attorney General:

> In *Pitts v. Reagan* (1971) 14 Cal.App.3d 112, 92 Cal.Rptr. 27, it was held that this provision (then of art. 10, § 1 of the Constitution), meant "that the state may not let out [i.e., allow to be used, hire out, or permit] convict labor *by contract* to private employers regardless of whether the state or the convicts or both receive the attendant consideration." (14 Cal.App.3d at p. 118, 92 Cal.Rptr. 27 (emhpasis [sic] added).) *In that case the labor was arranged pursuant to contract between the employer and the state, not with the prisoner* (id., at p. 116, 92 Cal.Rptr. 27), *and after reviewing the proceedings of the California Constitutional Convention of 1878 1879, the court felt the "rather strong probability, that the delegates, or at least the majority, were concerned with the abolition of contracted convict labor generally ...."* (*Id.,* at pp. 118-119, 92 Cal.Rptr. 27.)

63 Ops. Cal. Att'y Gen. No. 79-1016, at 33, 36 (1980) (second emphasis added). This accords with my interpretation.

we would be tempted to dismiss its musings on the Illinois Constitution as mere dicta.

All of the other out of state cases canvassed by the majority, properly read, are predicated on the State's *ownership* of convict labor; the very thing article II, section 29 forbids the State from selling. These cases do not support the majority's implicit holding that our state constitution banned competition qua competition. *E.g., Ove Gnatt Co. v. Jackson,* 173 N.E. 335 (1930), 177 N.E. 607, 607 (Lockyear, J., dissenting) (Ind.Ct.App.1931) ("the contract system ... the state sells the labor of the prisoners to private corporations or individuals, and in each the contractor and prison authorities agree upon a task which is supposed to constitute a reasonable day's work."); *Rice v. State,* 108 Okla. 4, 232 P. 807, 813 (1924) (founders motivated by mercy, not by a desire to end competition with free labor); *State ex rel. Greaves v. Henry,* 87 Miss. 125, 40 So. 152, 162 (1906) (describing the old convict leasing system as between the businesses and the State); *State ex rel. Davis v. Mortensen,* 69 Neb. 376, 95 N.W. 831 (1903); *see Thompson v. Bronk,* 126 Mich. 455, 85 N.W. 1084 (1901) petitioner who had been subject to convict contract labor whose conviction was later vacated had no right to compensation); *People v. Hawkins,* 157 N.Y. 1, 13, 28, 51 N.E. 257 (1898) ("contracting" convict labor refers to "practices ... formerly existed, under which the labor of convicts had become a subject of bargain and sale" and "unpaid, compulsorily enforced labor"); *Nugent v. State of Arizona Imp. Co.,* 173 U.S. 338, 338-42, 19 S.Ct. 461, 43 L.Ed. 721 (1899) (describing legislatively authorized contracts for convict labor); *Walton County v. Franklin,* 95 Ga. 538, 538, 22 S.E. 279 (1894) (county officials have no power to hire out convicts, therefore contract to do so is unenforceable). The fact that many of these states were using a public use system at the time is simply not relevant.

CONCLUSION

We should not forget that this is a facial challenge to a statute and program that, by state and federal law, specifically requires that the Department of Corrections take steps to ensure that free labor is not displaced. The majority position that a prison

labor program which displaces free labor may so frustrate the intent of the founders in propounding article II, section 29 that it must be deemed unconstitutional is foreseeable, but not in a facial challenge. Majority at 53. A program that, as a matter of fact, displaces free labor, *as applied,* may violate article II, section 29--*as applied.* Since displacement is illegal under state and federal law, we will probably never need to reach the question of whether displacement is unconstitutional. The question answered by the majority is simply not before this court within this facial challenge.

We agree our founders were attempting to avoid many evils. Majority at 53. It may be that had our founders contemplated the private employment of prisoners, they would have forbidden the private employment of prisoners. But we do not invalidate legislation on a maybe. Because that is what this court does today, we respectfully dissent.

SANDERS, IRELAND, and OWENS, JJ., concur.

151 Wash.2d 470, 90 P.3d 42

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APPENDIX B

THE SUPREME COURT OF WASHINGTON

WASHINGTON WATER JET WORKERS ASSOCIATION; Talon Industries, Inc., Cutting Technology, Inc.; Pacific-Rim Enterprises, Ltd.; Jetpoint Technologies L.L.C.; Specialty Metals Corp.; Definitive Solutions & Technologies, Inc.; and Maxtec, Inc., Appellants, v. Howard YARBROUGH, in his official capacity as the Administrator of the Division of Correctional Industries; Washington State Department of Corrections, Division of Correctional Industries; Jet Holdings, Ltd., d/b/a Microjet; and Kenneth Piel and Sharon Piel, Respondents.	)	No. 70814-2 **ORDER DENYING MOTIONS FOR RECONSIDERATION**

ALEXANDER, Chief Justice.

The Court having considered MicroJet's Motion for Reconsideration and the Department of Corrections Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

Both motions for reconsideration are denied.

DATED at Olympia, Washington this 18th day of August,

2004.

For the Court

/S/ Gerry L. Alexander
CHIEF JUSTICE

Dissent to Order Denying Motions For Reconsideration

IRELAND, J. (dissenting).

The majority at 151 Wash.2d 470, 90 P.3d 42, has failed to regard the significant issues raised by the motions to reconsider and allows the decimation of a carefully crafted prison work program adopted by the Legislature more than two decades ago, which has been a national model. In striking down RCW 72.09.100(1), the majority has failed to articulate and to apply the standard for proof of unconstitutionality, which is proof *beyond a reasonable doubt. Tunstall v. Bergeson,* 141 Wash.2d 201, 220, 5 P.3d 691 (2000). In disregarding the standard, the court has ignored the doctrine of separation of powers and has intruded on the proper exercise of legislative authority. *Island County v. State,* 135 Wash.2d 141, 147, 955 P.2d 377 (1998). The majority's construction of article II, section 29, has stricken the words "for the benefit of" out of the state constitution, contrary to proper rules of construction. *Stone v. Sheriff's Dep't,* 110 Wash.2d 806, 810, 756 P.2d 736. The majority has conflated an "as applied" challenge with a "facial challenge." *Waterjet II,* 151 Wash.2d 470, 511, 90 P.3d 42 (2004) (Chambers, J., dissenting). For these reasons, reconsideration should have been granted, the opinion authored by Bridge, J. vacated, and the opinion of this court authored by Chambers, J. reinstated.

However, by far the greatest failing in denying the motion for reconsideration is the court's refusal of the request to clarify and give direction to the trial court on remand. Reconsideration is deemed unnecessary by the majority since the opinion quoted only the "employer model" language of the statute (rather than the "customer model" language) and that the analysis clearly makes a

distinction between state-run and privately-run programs. While that is true, on remand, the trial court should not have to guess. This court should have clearly declared that its decision does not apply to the customer model. To fail to do so hampers the Department of Corrections in working with the existing businesses to bring them into compliance with this court's view of what the constitution requires. These businesses have operated in good faith and upon representations made by the state for years. The state and its taxpayers should not have to face additional lawsuits to deal with these issues and other consequences of this court's failure to clarify its decision.

For these reasons, I dissent to the order denying reconsideration.

IRELAND, J.

APPENDIX C

THE SUPREME COURT OF WASHINGTON

WASHINGTON WATER JET WORKERS ASSOCIATION, et al.,	)	NO. 70814-2
Appellants,	)	
v.	)	**ORDER ON REHEARING**
HOWARD YARBROUGH, et al.,	)	
Respondents.	)	

The Court having considered the Appellants' Motion for Reconsideration. Now, therefore, it is hereby

ORDERED:

That the Appellants' Motion for Reconsideration is granted. The Court has determined that this matter will be set for rehearing. The Clerk is directed to set the case for oral argument in the Fall Term.

DATED at Olympia, Washington this 22nd day of July, 2003.

For the Court

/S/ Gerry L. Alexander
CHIEF JUSTICE

APPENDIX D

THE SUPREME COURT OF WASHINGTON

WASHINGTON WATER JET WORKERS ASSOCIATION; Talon Industries, Inc.; Cutting Technology, Inc.; Pacific-Rim Enterprises, Ltd.; Jetpoint Technologies L.L.C.; Specialty Metals Corp.; Definitive Solutions & Technologies, Inc.; and Maxtec, Inc., Appellants, v. Howard YARBROUGH, in his official capacity as the Administrator of the Division of Correctional Industries; Washington State Department of Corrections, Division of Correctional Industries; Jet Holdings, Ltd., d/b/a MicroJet; and Kenneth Piel and Sharon Piel, Respondents.	)	No. 70814-2. **En Banc** Argued Jan. 31, 2002. Decided Jan. 16, 2003.

CHAMBERS, J.

Washington Constitution article II, section 29 provides:

> After the first day of January eighteen hundred and ninety the labor of convicts of this state shall not be let out by contract to any person, copartnership, company or corporation, and the legislature shall by law provide for the working of convicts for the benefit of the state.

We must determine whether this language prohibits *all*

private employment of prisoners or whether it only prohibits the now-unused eighteenth and nineteenth century "contract system of labor." Under the contract system, the State leased the involuntary labor of prisoners to private contractors who had near complete control of the prisoners. The system was inhumane, corrupt, and universally condemned. By contrast, the Washington Legislature has created a system where prisoners may be gainfully employed by private business. *See* RCW 72.09.100(1). This system is entirely voluntary and the statute requires that prisoners be paid a fair wage. We find that our constitution bars the State from selling the involuntary labor of prisoners by use of the contract system of labor. We also find that the contract system of labor bears no resemblance to the program established by RCW 72.09.100(1), and therefore, the legislature had the power to establish this beneficial employment program.

FACTS

From the building of the first prisons, prisoners have been expected to work. William J. Farrell, *Prisons, Work and Punishment* 26 (1994). State legislatures demanded that prisons be self-supporting, creating a drive for not merely work, but profit. *Id.* Historically, prisoner labor has not been voluntary. *See generally* David M. Oshinsky, *"Worse than Slavery" Parchman Farm and the Ordeal of Jim Crow Justice* (1996) (noting whippings, mutilations, starvation, lack of food and shelter, and mortality rates ranging up to 40 percent annually). Convicts were "let out by contract" or "leased" to private employers who often treated them with extreme brutality. *See also State ex rel. Greaves v. Henry*, 87 Miss. 125, 40 So. 152, 162 (1906) (Whitfield, C.J., dissenting) (condemning convict leasing as causing "outrages and brutalities which have covered [Mississippi] with unspeakable obloquy."). Leasing and contracting out the labor of prisoners was abandoned in the federal penal system in 1900. *See* Blake McKelvey, *The Prison Labor Problem: 1875-1900*, 25 J. Am. Inst.Crim. L. & Criminology 268 (1934). Not long afterward, the Ashurst-Sumners Act of 1935, codified at 18 U.S.C. § 1761, criminalized the interstate transport of prison-made goods and effectively ended the private use of prison labor in state prisons. Ashurst-Sumners was amended in the 1970s to

allow the interstate transport of goods made by prisoners in state institutions as long as certain requirements were met: most notably that the prisoners be paid "not less than that paid for work of a similar nature in the locality in which the work was performed," 18 U.S.C. § 1761(c)(2); that the programs be certified; that local business and labor be consulted; that wages be set as to not displace noninmate workers; and that the prisoners be volunteers. *See* Dep't of Justice, Office of Justice Progs., *Prison Industries Enhancement Certification Program Guideline.* 64 Fed.Reg. 17000, 17009-01 (Apr. 7, 1999) (hereinafter *Prison Indus. Enhancement Cert. Program Guideline*). This serves the goal of Ashurst-Sumners, to combat "the evils attending the sale of [prison-made] goods, in the open market, in competition with goods manufactured and produced by free labor." S.Rep. No. 906, 74th Cong., 1st Sess. (1935). Wages must be comparable to combat the problem that "free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison." *Ky. Whip & Collar Co. v. Ill. Cent. R.R. Co.,* 299 U.S. 334, 351, 57 S.Ct. 277, 81 L.Ed. 270 (1937) (quoting *Whitfield v. Ohio,* 297 U.S. 431, 439, 56 S.Ct. 532, 80 L.Ed. 778 (1936)).

In 1981, following the invitation of the amended Ashurst-Sumners Act, Washington State promulgated RCW 72.09.100, which created five classes of prison labor including private employment. Today we are concerned only with . 100(1), which empowers the Department of Corrections to establish:

> (1) CLASS I: FREE VENTURE INDUSTRIES. The employer model industries in this class shall be operated and managed in total or in part by any profit or nonprofit organization pursuant to an agreement between the organization and the department. The organization shall produce goods or services for sale to both the public and private sector.

RCW 72.09.100(1). This program is administered by "Correctional Industries." *See* RCW 72.09.070. The statute requires that

prisoners be volunteers, that they be paid a comparable wage, and that the impact of any employment program be analyzed to avoid displacing free workers. RCW 72.09.100.[1] There are currently 36 programs certified in Washington State; only one, MicroJet, is before the court at this time.

MicroJet employs prisoners to work in the water jet cutting industry. Water jet cutting uses a waterborne stream of particulates to cut metal or stone into precise shapes. MicroJet and the Department of Corrections entered into a contract "for the purpose of providing work training and/or vocational training for offenders of the Washington State Reformatory." Clerk's Papers (CP) at 5 (Contract Agreement). This contract provides MicroJet with approximately 11,280 square feet of space on the grounds of the reformatory, and sets out provisions for maintenance, liability, security, power and other utilities. It also details how prisoners will come to be employed by MicroJet. "The Department shall provide referrals through the Offender Work Coordinator in accordance with the job descriptions and required qualifications set forth by [MicroJet]. [MicroJet] will in turn interview and hire." CP at 9. The contract requires "[m]andatory compliance [with] applicable federal state and local laws, ordinances and regulations." CP at 13.

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[1] In 1993, the Department of Corrections promulgated a "division directive" to detail implementation of the act. It is unclear if this document has been recently updated. It states in part:

> The institution will post job descriptions, accept applications for employment and screen applicants for minimal qualification. The private sector partner will interview and select employees from the pool of pre-screened offenders. The private sector partner will employee selected offenders at a wage comparable to wages paid for work of a similar nature in the locality in which the partnership is located as verified by the Employment Security Department.

Offender employment in the private sector partnership shall be voluntary. Clerk's Papers (CP) at 92. Information before this court on how this program is actually implemented is scant and unnecessary for the resolution of the constitutional issue.

Water Jet is an informal association of businesses and individuals who do similar work. Water Jet brought suit on various theories in the hope of voiding the MicroJet contract and receiving money damages. The trial court dismissed claims based on Ashurst-Sumners, 42 U.S.C. § 1983, and Washington Constitution article II, section 29, and all claims brought against the Piels, owners of MicroJet, in their individual capacity. Water Jet voluntarily dismissed their remaining causes of action and sought direct review on only the claims based on the state constitution and Ashurst-Sumners. We accepted review and affirm the trial court.

STANDARD OF REVIEW

A duly enacted statute is presumed constitutional. *State v. Sullivan,* 143 Wash.2d 162, 180, 19 P.3d 1012 (2001). The party challenging the statute must demonstrate its unconstitutionality beyond a reasonable doubt. *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.,* 144 Wash.2d 570, 577, 29 P.3d 1249 (2001).

Structure of article II, Section 29

First we look at the structure of the constitutional provision. Article II, section 29 contains two clauses: (1) "the labor of convicts of this state shall not be let out by contract" and (2) "the legislature shall by law provide for the working of convicts for the benefit of the state." Both clauses limit the plenary power of the legislature to act or not act as it sees fit. *See, e.g., State v. Foster,* 135 Wash.2d 441, 458- 59, 957 P.2d 712 (1998); *State v. Russell,* 125 Wash.2d 24, 61, 882 P.2d 747 (1994); *State v. Gunwall,* 106 Wash.2d 54, 67, 720 P.2d 808 (1986). The first clause restricts the traditional power of the State to lease or sell the labor of convicts to private parties under the contract system. The second clause restricts the power of the State to let convicts sit idle; it mandates that the legislature provide work for convicts to benefit the State.

PLAIN LANGUAGE

The words of the constitution are interpreted as they would have been commonly understood at the time the constitution was ratified. *State v. Brunn*, 22 Wash.2d 120, 139, 154 P.2d 826 (1945); *see also* Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L.Rev. 491, 509-10 (1984).

The first clause of article II, section 29 provides that "the labor of convicts of this state shall not be let out by contract to any person, copartnership, company or corporation." Therefore, the common meaning in 1889 of "shall not be let out by contract" is critical. An examination of the plain language in historical context demonstrates that "let out by contract" refers to the contract system of convict labor.

The exact phrase is used in a contemporaneous territorial newspaper in an article on the harshness of the contract system of convict labor used in the Washington Territory. The *Lewis County Nugget* reported prisoners' complaints of being forced to wear heavy balls and chains while working, and of other harsh conditions at the prison. The *Nugget* suggested prisoner labor would be more profitable for "the Territory to take it in charge instead of *letting it out by contract.*" *Visit to the Territorial Penitentiary, Lewis County Nugget* (Chehalis), Aug. 4, 1883, at 1 (emphasis added). In the 1880s, the common and ordinary meaning of letting out the labor of convicts by contract referred to the contract system of convict labor in the territorial prison.

A dictionary published near the date of the constitutional convention defined "let" as: "To grant possession and use for a compensation; to lease; as, to *let* an estate for a year; to *let* a room for lodgers;--*often followed by out.*" *American Dictionary of the English Language* 766 (1899) (emphasis added). We believe that this is the definition that the founders had in mind. Given that, we properly read the provision to say: "[T]he labor of convicts of this state shall not be [leased, rented out] by contract to any person."

We note that there is very little in the history of this nation or of prisons that supports the contention that *allowing* prisoners to

work for private enterprise has been a major concern. In fact, we have found no evidence that *allowing* prisoners to work as employees was ever contemplated historically. There is, however, considerable support in the history of this nation and our State that supports the contention that *forcing* prisoners to work under the control of private contractors was of major concern and that many interest groups allied to fight the practice. *See, e.g.,* McKelvey, *supra,* at 254; *see also Prison Indus. Enhancement Cert. Program Guideline* (organized labor, human rights activists, and others argued to Congress that the flow of goods made by prison labor had had an adverse impact on the nation).

Next we look at the plain language of the second clause of article II, section 29, which provides: "and the legislature shall by law provide for the working of convicts for the benefit of the state." Appellants argue the phrase means that prisoners must work *for* the State, in state-owned and operated industries. We disagree. If the framers had intended that, they would have simply stated "for the state." Instead, they chose to use the expansive phrase, "for the benefit of the state." If the members of the constitutional convention had intended that convicts must be employed directly by the State, they would have expressed that requirement in a simple, clear statement.

The 1899 dictionary definition of "benefit" is quite broad: "Whatever contributes to promote prosperity and personal happiness, or adds value to property; advantage: profit." *American Dictionary, supra,* at 125. The delegates knew then, just as we know now, that keeping inmates employed benefits the State. By the time of our constitutional convention, "in fact, it had become recognized, and was so recognized by all students interested in the reformation of prisoners, that regular labor of some kind was necessary and essential for good order within the prison walls." *Utah Mfrs. Ass'n v. Mabey,* 63 Utah 374, 226 P. 189, 189 (1924). Prison officials in Washington knew that providing work for the convicts was essential, the benefits of which "cannot be estimated in dollars and cents as is shown by all the best penologists of the day." State of Wash., *Annual Report of the Penitentiary Commissioners* 4 (1890). Providing useful work not only reduced the cost of maintaining the convicts but was also

of "great benefit from a mental, moral and physical standpoint." State of Wash., Gov. Chas. E. Laughton, *Message to the Washington Legislature* 45 (1891).

Thus, it is clear the framers contemplated benefits beyond monetary profit in providing employment to inmates. The framers used "benefit" in its commonly understood sense of "advantage." In light of the use of its terms at the time the state constitution was propounded, we find that article II, section 29 does not prohibit the private employment of prisoners.

HISTORICAL CONTEXT

In order to understand the meaning and purpose of a constitutional provision, we must look at the historical context in which it was adopted. *Westerman v. Cary,* 125 Wash.2d 277, 288, 892 P.2d 1067 (1994). While this is true of all constitutional provisions, it is especially pressing here because the prison system and circumstances of convict labor in 1889 were so very different than today.

The appellants claim that labor interests were the single overriding historical influence in the development of article II, section 29 and that the primary goal of delegates was to prevent competition between convict labor and free labor. This is not supported by history.[2]

"The history of the prison is in large measure a history of prison labor." Stephen P. Garvey, *Freeing Prisoners' Labor,* 50 Stan. L.Rev. 339, 342 (1998). The first prisons in the United States were organized around the concept of work to reform the inmate. James J. Misrahi, Note, *Factories with Fences: An Analysis of the Prison Industry Enhancement Certification Program in Historical Perspective,* 33 Am.Crim. L.Rev. 411, 413 (1996). Prisons were an economic drain on the community. A

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[2] For its historical facts and analysis, the petitioners rely heavily on an unpublished paper written by a law student for a state constitutional law class. The paper is rife with factual errors and unsupported conclusions.

movement to make the prisons self-supporting became the driving force behind American penal policy in the nineteenth century. William J. Farrell, *Prisons, Work and Punishment* 27 (1994). Believing that they were simultaneously achieving financial and reformist goals, prison administrators made contracts with private manufacturers to lease convict labor. *Id.*

Different models developed, but the primary systems were the lease system and the contract system. They shared the essential features that prisoners worked involuntarily, overwhelmingly without compensation, as assigned, under the direct or indirect control of the private contractor who was given a free hand to punish and reward inmates.

By 1880, the model established in every southern state was the lease system. Farrell, *supra,* at 91. Under the lease system, inmates worked outside the prison, generally on railroads, in mines or on agricultural projects under the complete control of the private lessees. Misrahi, *supra,* at 415-16. In effect, the State dismissed convicts from its control and put them at the mercy of lessees who had little interest in reform or proper control and maintenance of the prisoners. *Henry v. State,* 87 Miss. 1, 39 So. 856 (1906). One of the major problems with the leasing system, "and one which led to its ultimate demise, was the complete lack of governmental control over the custody and care of prisoners." 1985 S.C. Op. Att'y Gen. Nos. 85-821, at 217 (1985). Historians have documented horrific abuses and huge mortality rates. *See generally* Oshinsky, *supra; see also State ex rel. Greaves,* 87 Miss. 125, 40 So. 152.

In the northern states, when Washington was still a territory, a contract system prevailed. Under the contract system, prison officials and private contractors entered into legal agreements under which the prison would furnish a certain number of prisoners at a fixed price. Misrahi, *supra,* at 415. The labor of the convict was sold to the highest bidder by private companies who paid the State for this privilege. *See Josey v. DuBois,* 6 Mass. L. Rptr. 287, 1996 WL 754890 (1996). Most of the work was done inside the prisons, which often became prosperous factories for the private contractors. Farrell, *supra,* at 93.

Corruption and cruelty were standard. *Id.*

By 1874, the legislature of the Washington Territory recognized there were too many convicted felons to continue the practice of housing inmates in the county jails and a central prison was needed. Wash. State Dep't of Inst., *State Prison--A History of Adult Corrections in Washington, Perspective* 5 (Spring-Summer 1966) (hereinafter *Perspective*). The federal government offered to turn over the McNeil Island federal facility for $36,000. *Id.* Two independent counter-proposals for the housing of convicts were made by William Billings, the Thurston County Sheriff, and Jerry Smith, former Pierce County Sheriff. *Id.* Both men offered to construct a prison and take custody of the inmates in return for a subsistence allowance and the right to the labor of the convicts. *Id.* Other entrepreneurs recognized the profitability of such an arrangement and "[s]oon the legislature was beset by a horde of public-spirited citizens, all anxious to relieve the territory of its custodial problems." *Id.* Billings and Smith combined their proposals and used their political influence to gain legislative approval of the contract, which was then signed by the territorial governor. *Id.* The local paper complained that in giving the six year "lease" to Billings, the territorial legislature had conferred "a special privilege to the fullest extent." *In a Quandry, Washington Standard* (Olympia), Nov. 24, 1877, at 1.

Under the contract, Smith and Billings received 70 cents per day per inmate, an additional $500 for transportation costs, and all proceeds of the convicts' labor. Smith and Billings joined with a third partner, Oliver Shead, who provided the land and $4,000 cash for the construction of what would be called Seatco prison, in what is now Bucoda, south of Olympia. *Perspective, supra,* at *6.*

Seatco "was operated under a 'contract' system." James M. McCauley, *A Review of the Washington State Penitentiary* 1886-1939, at 1 (1939). The contract system, as practiced in Washington, had many of the features of the southern lease system, probably because, like much of the South, Washington Territory had no state-owned facility to house the convicts. Billings and his partners were free to use the convicts in any way they saw fit. *Pioneer Reminiscences, in Early History of Thurston*

County, Washington 276-77 (Mrs. George E. Blankenship, ed., 1914). As with the lease system, the contractors personally retained all the profits of the convicts' labor and had complete control of the prisoners housing, clothing, feeding, providing medical assistance to and guarding the inmates at their own facility. *Id.*

Billings and his partners started a cooper factory for building barrels, and created the Seatco Manufacturing Company for making sashes, doors, and blinds. The partnership also leased convicts to nearby farms. In addition, they developed a coal mine worked by inmates. Shead was part owner of a sawmill and he assisted Smith and Billings in buying out the other partners so that the three could then run the sawmill on prison labor for free. Neil B. Corcoran, *Bucoda--A Heritage of Sawdust and Leg Irons* 24-26 (1976). The Billings partnership was hugely profitable.[3]

Seatco gained a widespread reputation for brutality. Perspective, *supra,* at 7; *see generally* George W. France, *The Struggles for Life and Home in the North-West* (1890).[4] In order to cut down on the expense of guards, prisoners wore iron ankle cuffs riveted to each ankle and fastened together by long chains. Each weighed between 10 and 18 pounds, and the inmates wore them round the clock. Frequent punishments included a bread and water diet, exposure to cold, the whipping post, and freely

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[3] In 1881 there were 53 inmates at Seatco at an annual cost to the Territory of $24,002. By 1883, there were a reported 73 prisoners at a cost of $33,000, though inmate George France claimed that this figure included charges by the contractors of $1,533 for 6 nonexistent prisoners. Corcoran, *supra,* at 31. However, the biggest profit to the contractors was the free labor for their various enterprises. For example, the sash and door factory, manned completely with convict labor, was " 'one of the largest sash and door factories on the coast at the time.' " Corcoran, *supra,* at 26 (quoting 2 William Prosser, *Washington, West of the Cascades* (1917)).

[4] George France spent seven years at Seatco and wrote a book about his experience. According to France, cruelty was common. He tells of one inmate who had nine of his teeth pulled by a guard after the inmate complained about conditions to visiting territorial authority. France, *supra,* at 282-84. The conditions were comparable to those of the Dark Ages. E.T. Short, *After Many Years, Tacoma Times,* Mar. 25, 1939.

administered kicks and blows by the guards. Perspective, *supra,* at 7; France, *supra,* at 257.

An exposé by a Seattle paper charged that the treatment of the prisoners at Seatco "was of a sort better adapted for the care of animals than human beings." *The Penitentiary, Seattle Weekly Chronicle,* Oct. 4, 1883, at 4. The paper criticized the contract system at Seatco as a "system wrong in principle, and doubly so in practice. It opens the door for the entrance of personal greed of gain, cruelty and neglect of men so kept." *Id.* Public pressure caused Governor Newell to seek legislative approval to provide removable irons for the inmates. Corcoran, *supra,* at 27. The territorial legislature approved his initial request though it took another three and one-half years before removable irons were provided. *Id.*

As newspapers published accounts of the abuses at Seatco, calls were made for a more thorough legislative investigation to ensure that "the cupidity of contractors, and the natural thirst for cruelty which is the usual result of absolute power, do not overleap the line of simple justice." *Seattle Weekly Chronicle,* Oct. 4, 1883, at 4.

Demands were made to appoint a qualified warden in place of Billings' hired superintendent. They appropriated $600 per year for such an official. However, the territorial governor then appointed the former employee of the contractors to continue in charge. *Perspective, supra,* at 7.

In 1886, the legislature decided to take direct control over the prisoners and voted to abandon the contract system, although Billings and his political allies fought hard to keep it. *Perspective, supra,* at 7; France, *supra,* at 284-85, 309. Even after the legislature approved a penitentiary at Walla Walla, the Billings partnership was almost successful in derailing the plan. France, *supra,* at 284. The territorial governor appointed three building commissioners, who visited Oregon and California institutions, and then returned with recommendations for the new prison. *Perspective, supra,* at 7. Finally, in 1887, Seatco was vacated, ending a "dark spot in the history of the territory." E.T. Short,

After Many Years, Tacoma Times, May 25, 1939.

When prisoners were transferred to Walla Walla, one of the first requests of the new warden was for work for the inmates because he was concerned about the effects of idleness. The inmates produced bricks for use at the prison and later made jute bags for sale to farmers. The Walla Walla State Penitentiary still stands.

The myriad problems inherent in the contract and leasing systems of convict labor spurred a national movement to reform prison labor systems. This movement was spearheaded by labor groups, small businesses, humanitarian organizations, and prison reformers. In response, the majority of states passed statutes or adopted constitutional provisions that restricted or prohibited the contract and lease systems of convict labor. Misrahi, *supra,* at 97-98.

It is against this backdrop that the delegates to Washington's constitutional convention met in 1889 and considered the proposals that ultimately became article II, section 29. It is true that across the country, labor organizations opposed the competition of convict labor. However, to say that the Washington delegates' opposition to the leasing system was based solely, or even primarily, on the concern for labor interests denies the extensive reputation for brutality, corruption, and ineffectiveness that the contract system of convict labor had in the Washington Territory and throughout the country.

There was a strong populist influence at the time of the constitutional convention. Populists sought to protect the ordinary people against unfair advantages created by coalitions between big government and politically connected big business. The populist movement was opposed to the corruption inherent in the contract system in the Washington Territory. Delegates to our state constitutional convention feared "the tyranny of corporate power and special interests that might capture control or otherwise corrupt governing institutions." Cornell W. Clayton, *Toward a Theory of the Washington Constitution,* 37 Gonz. L.Rev. 41, 66

(2002)(emphasis omitted). In adopting article II, section 29, the delegates restricted the legislature's traditional power over convict labor in an effort "to protect against special interest legislation." Clayton, *supra,* at 68. It was special interest legislation that had authorized, and then extended, the Billings contract. The corruption, cruelty, and exploitation of convict labor at Seatco, along with the political favors granted the contractors, were well known throughout the territory at the time of the constitutional convention. France, *supra,* at 309-12. The delegates to the constitutional convention prevented such special interest legislation, and the corruption of government institutions by the contract system of convict labor, from occurring again. Such problems do not accrue to voluntary, private employment.

FRAMER'S INTENT

The only contemporaneous reports of the discussion of article II, section 29 appeared in two newspapers, the *Tacoma Daily Ledger* and the *Tacoma Morning Globe.* The *Ledger* article is entitled, "*Convict Labor, Delegates Oppose Leasing the Services of Criminals to Corporations.*" *Tacoma Daily Ledger,* Aug. 10, 1889, at 4. Two of the committees' nine members voiced an objection to convict labor competing with free labor. *Id.* The only other report of the deliberations on article II, section 29 appeared in the *Tacoma Morning Globe.* That report in its entirety stated: "Section 32, forbidding the leasing of convict labor, was taken up. West wanted to strike it out but Griffitts, Moore, Reed, Prosser, and Buchanan strongly opposed this motion and it was defeated." *Tacoma Morning Globe,* Aug. 10, 1889, at 1. The reports of both papers make clear that what the delegates were debating was the "leasing" of convict labor. What they prohibited was the system of convict labor under which convicts were leased or contracted out.

Labor interests were unsuccessful in their attempts to prohibit the private employment of prisoners. A labor union had petitioned the delegates to include the following provision, "Convict labor shall not be employed in competition with free labor." *Tacoma Daily Ledger,* July 18, 1889, at 1. The delegates rejected the provision. We decline to give article II, section 29 the

precise meaning the framers refused to adopt.

UTAH, NEW YORK, OKLAHOMA

The majority of states which have considered the meaning of their statutory or constitutional provisions abolishing contract or lease system of convict labor have rejected the proposition that such provisions were intended to prevent competition with free labor.

Like Washington, Utah prohibited contract labor in its 1896 constitution. When interpreting its parallel provision, the Utah court noted:

> It commands or directs the Legislature to prohibit contracting convict labor. Historically, the phrase "contracting convict labor" may be said to have had a well-understood meaning at the date of the adoption of our state Constitution. In the early days of the republic it was the custom of the states to lease or hire to private individuals convict labor and at a later date to lease or hire such labor to individuals or corporations. The cruelty to the prisoners, together with the general abuse of the system, in that the states received little, if any, compensation for the services of the prisoners rendered, had raised such opposition and public criticism that many of the states had, prior to the adoption of the Constitution of this state, prohibited officials from entering into contracts for the labor of prisoners.

Utah Mfrs. Ass'n, 226 P. at 189. The Utah Supreme Court clearly understood "contracting" to mean the contract system of convict labor. The court concluded that the work program complained of by plaintiffs did not have "any of the elements of 'contracting convict labor,' as that phrase is and was generally understood." *Id.* Therefore, the work program did not violate the

constitutional provision. *Id.*

Similarly, in *People v. Hawkins*, 157 N.Y. 1, 12, 51 N.E. 257 (1898), the court interpreted New York Constitution 1894, article 3, section 29, which required the legislature to provide for the working of inmates and forbade the labor of convicts "be farmed out, contracted, given or sold to any person, firm, association or corporation." *Id.* There the court rejected the argument that the constitutional provision "indicates and expresses a public policy on the part of the state to suppress the competition of prison labor with free labor." *Id.* "Surely, the poverty of our language is not such as to preclude the framers of the fundamental law from giving plain and direct expression to such a simple thought." *Id.* at 13, 51 N.E. 257. The court held instead that the constitutional provision addressed "practices that had formerly existed, under which the labor of convicts had become a subject of bargain and sale. It simply abolished what was known as the 'contract system' of labor in prisons." *Id.*

Similarly the Supreme Court of Oklahoma found Oklahoma's parallel constitutional provision prohibited the contract system of labor. *Rice v. State ex rel. Short,* 108 Okla. 4, 232 P. 807, 813 (1924). The provision reads: "The contracting of convict labor is hereby prohibited." Okla. Const. art. XXIII, § 2. The court held this was aimed at eliminating "the practices then existing in some states of leasing or farming out convicts to individuals or private corporations." *Rice,* 232 P. at 813. "We cannot believe that the Constitution makers had in mind the protection of free labor from competition with convict labor. Had they so intended, they would have said so." *Id.* We agree.

Like the courts of Utah, New York, and Oklahoma, we do not believe the framers of our constitution intended article II, section 29 to protect free labor from competition with convict labor. Indeed, they were invited to adopt a provision that would have clearly and simply prohibited such competition, but declined to do so. Therefore, voluntary private employment is not constitutionally prohibited.

CALIFORNIA AND ILLINOIS

Some of these issues before us today were considered in *Pitts v. Reagan,* 14 Cal.App.3d 112, 92 Cal.Rptr. 27 (1971). Our constitutional provision is almost identical to the provision California adopted in 1879. Under that provision, the California Court of Appeals invalidated a program in which the State leased to agricultural growers the services of inmates to harvest crops. The constitutional problem in *Pitts* was that "[t]here were no individual contracts between the growers and the prisoners." *Pitts,* 14 Cal.App.3d at 116, 92 Cal.Rptr. 27. The only contracts that existed were between the growers and the State. *Id.* This is precisely what the California state constitution prohibited.

The *Pitts* court stated, and all parties agreed, that a "convict may himself *sell or hire out his services to a private person,* and that parole or other state officials may assist in that rehabilitative effort." *Pitts,* 14 Cal.App.3d at 117, 92 Cal.Rptr. 27 (emphasis added). This accurately describes our Class I industries. Each Class I inmate employee has an individual employment contract with his employer. The State assists the inmate in obtaining the job, but does not *assign* the inmate to the employer.

In addition, the harvesting program was not legislatively authorized even though it is the legislature that decides how inmates work. Nor did the program have a rehabilitative purpose that might have brought it within an existing California statute authorizing rehabilitative work programs. The opposite is true of our case. Our Class I industries are specifically authorized by statute to meet rehabilitative goals.

Our attorney general considered a similar factual scenario long ago. *See* 1934 Op. Att'y Gen. No. 318. The Department of Corrections had asked the Washington attorney general if a plan to trade convict labor to a local nursery in exchange for plants for the prison violated article II, section 29. The attorney general properly responded that the State is not allowed to trade the labor of convicts for products. Like *Pitts,* the arrangement was not legislatively authorized, did not contain individual employment

contracts entered into by the prisoners, and had no rehabilitative purpose. Like *Pitts,* it had the hallmarks of the forbidden contract system and it was properly disallowed by the attorney general. This is critically different from the system authorized by the legislature with RCW 72.09.100(1), which merely creates a structure in which private employers may enter into a voluntary employment relationship with prisoners for the purpose of rehabilitative goals set out by statute.

In 1932, the Illinois Court of Claims[5] considered the meaning of their provision, which was somewhat similar to our own.[6] *K. & S. Mfg. Co. v. Illinois,* 7 Ill. Ct. Cl. 107 (1932). The Illinois constitution is one we pay especial attention to because much of our own was drawn from it. However, we find the Court of Claims' conclusion that private employment of prisoners is unconstitutionally unpersuasive. The Court of Claims' reasoning was based largely on a 1903 law which greatly restricted the sale of prison made goods. *Id.* The Court of Claims did not discuss the history, the debates, or any of the other tools that this court uses to determine the meaning of the constitutional text, and thus its opinion is of limited value in interpreting our article II, section 29.

We find far more persuasive the experience of our western counterparts, which were especially concerned about special interests' potential to corrupt governmental institutions. Clayton, *supra,* at 66, 68, 83 (noting the influence of other western states adopting constitutions during the same period).[7] In adopting

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[5] The Court of Claims is a department of the Illinois Secretary of State's office. The judges are appointed by the governor and confirmed by the Senate, and make recommendations to the General Assembly about whether to appropriate funds to pay claims. They also prepare and monitor federal grants to crime victims. It is not an appellate court. *See http:// www.sos.state.il.us/depts/claims/about.html* (last visited Jan. 13, 2003).

[6] Illinois substantially revised its constitution in 1970, and this provision was abandoned. *See* Ill. Const. Prec. Preamble, Disp. Table.

[7] *See, e.g.,* Idaho Const. art XIII, § 3 (1880) (requiring convict labor "be done within prison grounds, except where the work is done on public works under the direct control of the state"); Mont. Const. art. XVIII, § 2 (1889) (prohibiting "contracting of convict labor"); Utah Const. art. XVI, § 3 (1886) (prohibiting

article II, section 29, the delegates restricted the legislature's traditional power over convict labor "to protect against special interest legislation." Clayton, *supra* at 68.

A review of the case law from other states and of the history from our own State supports our conclusion that our constitution, like so many of our sister states, prohibits the contract system of convict labor, not private employment of prisoners.

LEGISLATIVE HISTORY

Our State's legislative history shows that our State has always understood that article II, section 29 prohibited contract labor and mandated work programs for the benefit of the State.

In his 1891 address to the legislature, our governor reminded legislators they were "required to provide for the working of convicts for the benefit of the state" and asked them to fulfill "[t]his mandate of the Constitution" by passing legislation providing for the establishment of a jute factory at Walla Walla.[8] State of Wash., Gov. Chas. E. Laughton, *Message to the Legislature* (1891). The legislature accordingly authorized funds for the jute factory and for brick making equipment, and directed the superintendent "to dispose of the articles manufactured and not needed by the state, for cash, at private sale." 1 Ball.Code § 2747 (Laws of 1891, ch. 147, § 18).

In 1927, the legislature provided: "Every prisoner in the reformatory shall be required to work in such manner as may be prescribed by the director of business control: *Provided,* That

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"contracting of convict labor").

[8] Interestingly, besides providing "social, moral, and physical" benefits to the convicts, it was hoped the jute manufactory would provide an additional "far-reaching benefit" of depressing the price of burlap bags for local farmers and preventing private burlap dealers from becoming too powerful in the local market. *Supplementary Report of Prison Comm'rs,* 5, 6 (Jan. 15, 1891). Thus, while the legislators avoided displacing local workers, they sought to be very competitive in the private market.

prisoners shall not be employed in what is known as the contract system of prison labor." 10 Rem.RevStat. 10280-7 (Laws of 1927, ch. 212, § 7). This legislation simply restates the constitutional provision in reverse order: the director of the corrections department must provide work and can require the prisoners to work in pursuance of penal goals, as long as the contract system of labor is not revisited.

Similarly, in 1943 and 1959, the legislature again codified both portions of article II, section 29. Those statutes provide, in part, the secretary "shall have the power and it shall be his duty to provide for the useful employment of prisoners ... *Provided,* That no prisoners shall be employed in what is known as the contract system of labor." Rem. Supp. § 10279-1 (Laws of 1943, ch. 175, § 1); Former RCW 72.64.010 (Laws of 1959, ch. 28, § 72.64.010). The legislature interpreted "for the benefit of the state" to mean "useful employment" as determined by the secretary. While it is not conclusive, the phrasing would be awkward if the legislature intended to ban private employment of prisoners, but it easily conforms to an intention to give the secretary broad powers to provide for employment of prisoners while not violating the constitutional ban on reviving the contract system of labor.

In enacting chapter 72.09 RCW in 1981, the legislature designed a work program which avoided the hallmarks of the contract system and provided employment opportunities to the inmates which benefit the State. Chapter 72.09 RCW is part of a complete overhaul of the Department of Corrections begun in 1979 with establishment of the House Select Committee on Corrections. Over an 18-month period the committee heard the recommendations of a 90-person advisory task force and the written and verbal testimony of more than 450 individuals and organizations in more than 100 hearings.[9] Office of Prog.

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[9] The House Select Committee on Corrections stated that chapter 72.09 RCW was precipitated by the need to "insure that the tragedies of the 1970's and the lawsuits of 1980 do not continue into the future." Office of Prog. Research, *An Overview,* H.B. Rep. 235, at 1 (Wash. Mar. 2, 1981).

Research, *An Overview,* H.B. Rep. 235, at 1 (Wash. Mar. 2, 1981). The committee visited and studied every adult correctional facility and program in the state, as well as some in five other states. *Id.* The committee recommended "[t]otal reform of inmate work programs." *Id.* at 2. A series of basic principles were identified in establishing new work programs. They were:

-- The work ethic must be established in prisons;

-- Work programs should be modeled as closely as possible after the free enterprise system;

-- There must be incentives for good performance and disincentives for poor performance;

-- There must be a flexible wage scale for inmates which reduces unfair competition with private business by institutional industries;

-- Inmates should be required to share in the cost of corrections, and pay for restitution, and family support; and

-- Idleness in our institutions is destructive and must be eliminated as soon as possible.

Id. The Class I industries statute was designed to implement these goals, which clearly benefit the State.

During the senate debates on proposed legislation, article II, section 29 was read aloud. The senators' discussion included an explanation that the constitution prohibits the lending of convict labor, but that Class I industries inside the prison are not prohibited because they are for the benefit of the State. Audio tape: Senate Floor Debates of H.B. 235, Correctional Reform (cassette 2) (Apr. 26, 1981).

Pursuant to the statute, MicroJet and the Department of Corrections entered into a contract "for the purpose of providing work or training and/or vocational training for offenders of the Washington State Reformatory." CP at 5 (Contract Agreement). An offender work coordinator assists in referring inmates who

wish to work for an employer. "The Contractor will then interview and hire." CP at 9. The employment contract is between the inmate and the employer.

To refer a prisoner who voluntarily seeks employment is not to force him to work for a private employer without compensation. *Cf. Rector v. Cherry Valley Timber Co.*, 115 Wash. 31, 34-35, 196 P. 653 (1921) ("[W]here convict labor is contracted to private employers, such labor is involuntary.... [The convict] was sent there against his will and despite his protest."). Inmates working in Class I industries do so voluntarily.[10] These circumstances replicate as closely as possible the free enterprise system, one of the principles established by the House Select Committee on Corrections.

Both state and federal statutes protect against prison industries incorporating the hallmarks of the contract system. Federal safeguards are provided through the Federal Prison Industry Enhancement Certification Program (PIECP), codified at 18 U.S.C. § 1761(c). Washington law and PIECP certification require voluntary inmate participation, wages comparable to those paid[11] in the free labor force, analysis of the local labor market, consultation with organized labor and private industry, and annual audits by the Federal Bureau of Justice Assistance to ensure compliance with PIECP's requirements. 18 U.S.C. § 1761(c); CP at 92-94, 139-40, 157-71.

Allowing inmates who wish to be employed to work for Class I industries benefits this State. Recidivism, violent incidents among prisoners, and the taxpayer's burden are reduced as a result of the program. *Accord* Misrahi, *supra,* at 433. One state study

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[10] RCW 72.09.100(1) provides that inmates who work at Class I industries "shall do so at their own choice." RCW 72.60.100 provides that inmates are employees of the industry, not agents or employees of the State.

[11] If plaintiffs believe that the wages being paid by MicroJet are below market, or that MicroJet is receiving advantages which create unfair competition, we urge plaintiffs to seek enforcement of the fair labor mechanisms in both the state and federal statutes.

indicates prison industries reduce recidivism by 50 percent.[12] In addition, the mandatory contributions Class I employees make to the cost of their incarceration supports their own dependents and makes more likely the restitution of their victims. Misrahi, *supra*, at 434-35.

CONCLUSION

A review of the structure and language of article II, section 29 in light of the historical record makes clear that "let out by contract" would have been understood to refer to the contract and leasing systems of convict labor. Academic literature, cases from other states, and our legislative history all support this interpretation. Our constitution requires the legislature to provide work for our inmates without resurrecting the contract system.

RCW 72.09.100(1) is not the contract system revitalized. It explicitly provides for voluntary labor at a competitive wage, for the express goal of rehabilitation, under the custody and control of the State for the benefit of our State. We therefore conclude that RCW 72.09.100(1) is constitutional.

ASHURST--SUMNERS[13]

Next, we must determine if the trial court erred in dismissing claims based on the Ashurst-Sumners Act, 18 U.S.C. § 1761, including Water Jet's 42 U.S.C. § 1983 claim. Ashurst-Sumners does not explicitly create a cause of action.[14] Every court

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[12] According to a study by the Maryland Division of Corrections comparing released inmates participating in prison industries with those who did not participate. Prison Industry Enhancement Program at *http://www1.dpscs.state.md.us/doc/sui/pie.htm* (last visited Jan. 14, 2003).

[13] Given our disposition, we do not reach the other issues raised by the parties regarding associational standing, the piercing of the corporate veil, and the proper subjects of a 42 U.S.C. § 1983 claim. Appellants' request for attorneys' fees is denied.

[14] While not an issue in this case, the Bureau of Justice Assistance has created a mechanism for internal agency review. *See* 64 Fed.Reg. at 17013.

that has considered the matter has found that Ashurst-Sumners does not impliedly create a private cause of action, or rights enforceable through § 1983. *See McMaster v. Minnesota,* 30 F.3d 976, 981-82 (8th Cir.1994) ("Ashurst-Sumners does not provide a private cause of action, either expressly or by implication. Furthermore, Ashurst-Sumners creates no federal right enforceable by way of 42 U.S.C. § 1983."); *Wentworth v. Solem,* 548 F.2d 773, 775 (8th Cir.1977). *Accord *428Gonzaga University v. Doe,* 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). We concur, and affirm the trial court's dismissal of claims based on Ashurst-Sumners.

OVERALL CONCLUSION

We affirm the trial court's dismissal of appellants' claims. RCW 72.09.100(1) is not unconstitutional under article II, section 29, which only prohibits the contract system of convict labor, not the private, voluntary employment of prisoners. Further, we hold that Ashurst-Sumners does not create a private cause of action, or rights enforceable via a § 1983 action.

WE CONCUR: JOHNSON, MADSEN, IRELAND, and OWENS, JJ.

BRIDGE, J., (dissenting).

The majority has determined that it is constitutionally permissible for the Washington State Department of Corrections (Department) to enter into contracts with private businesses to employ prisoners in the production of goods and services for sale in the public and private sectors. Because I disagree with the majority's assertion that our constitution was only meant to prevent the abuses of the "contract system of labor" [15]rather than all

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[15] The "contract system of labor" refers to a nineteenth century system of convict labor under which there was a legal agreement between a private entity and prison officials for the labor of prison inmates for work performed within the prison. James J. Misrahi, Note, *Factories with Fences: An Analysis of the Prison Industry Enhancement Certification Program in Historical Perspective,* 33 AM.CRIM. L.REV. 411, 415 (1996). In contrast to the lease system that existed

contracts for prison labor between the State and private employers, I respectfully dissent.

Article II, section 29 of the Washington State Constitution provides that "the labor of convicts of this state shall not be let out by contract to any person, copartnership, company or corporation, and the legislature shall by law provide for the working of convicts for the benefit of the state." It took nearly 70 years after the framers adopted this section for the legislature to issue a mandate to the Department to develop inmate work programs. *See* RCW 72.64.010.[16] Then in 1981, [17]the legislature enacted the Corrections Reform Act of 1981, chapter 72.09 RCW, providing for five classes of prison labor. *See* RCW 72.09.100. The first class of prison labor in RCW 72.09.100, Class I: Free Venture Industries, permits inmate work programs that are operated and managed by private profit or nonprofit entities other than the Department.[18]

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primarily in the South, the State retained responsibility for feeding, clothing, housing, and guarding the convicts under the contract system. WILLIAM J. FARRELL, PRISONS, WORK AND PUNISHMENT 28 (1994).

[16] "The secretary shall have the power and it shall be his duty to provide for the useful employment of prisoners in the adult correctional institutions: *Provided,* That no prisoners shall be employed in what is known as the contract system of labor." RCW 72.64.010.

[17] Two years prior, Congress had amended the Ashurst-Sumners Act, 18 U.S.C. § 1761, to allow for the interstate transport of goods made by prisoners in State institutions, provided certain criteria were met.

[18] CLASS I: FREE VENTURE INDUSTRIES. The industries in this class shall be operated and managed in total or in part by any profit or nonprofit organization pursuant to an agreement between the organization and the department. The organization shall produce goods or services for sale to both the public and private sector.
The department of corrections shall supply appropriate security and custody services without charge to the participating firms. Inmates who work in free venture industries shall do so at their own choice. They shall be paid a wage not less than sixty percent of the approximate prevailing wage within the state for the occupation, as determined by the director of the institutional industries division. If the director finds that he cannot reasonably determine the wage, then the pay shall not be less than the federal minimum wage. RCW 72.09.100(1). The statute also establishes classes of inmate labor for "TAX REDUCTION INDUSTRIES," "INSTITUTIONAL SUPPORT INDUSTRIES," "COMMUNITY WORK

RCW 72.09.100(1).

It seems obvious that RCW 72.09.100(1) is unconstitutional because it directly conflicts with the plain language of article II, section 29 of the Washington State Constitution. The historical context of article II, section 29--including the debates at the Washington Constitutional Convention of 1889, the populist and labor movements, and the prison work programs implemented immediately preceding Washington's convention--supports this conclusion. In addition, decisions construing similar constitutional provisions from California and Illinois are persuasive and consistent with this interpretation.

I
CLASS I: FREE VENTURE INDUSTRIES

Pursuant to the authorizing legislation, the Department created a program of inmate labor called "private sector partnerships." *See* Clerk's Papers (CP) at 22-30. The Department enticed employers with the promise of lower overhead costs and a motivated and readily available work force. *Id.* The Department's promotional materials presented the allure of a higher profit margin, stating:

> By employing highly motivated workers and lowering your overhead rate by operating within an institution, you make money. If you don't have your own manufacturing plant or are unhappy with an out-of-state or offshore supplier, you can lower your procurement costs and get better service by contracting with Correctional Industries.

CP at 23. Businesses were told that they could save the costs of health insurance and other employment-related benefits, and could potentially receive bid preferences on state contracts. CP at 24.

INDUSTRIES," and "COMMUNITY SERVICE PROGRAMS." RCW 72.09.100(2), (3), (4), (5). These additional four classes are not before this court for consideration.

The Department, meanwhile, would also benefit because inmates would obtain training and skills that could help them become an integral part of society when released from confinement. Further, employment would potentially encourage a work ethic among inmates. The inmate workers would also pay taxes on their earnings, and wage deductions would be available to compensate victims and/or provide child support payments.

Consistent with its promotion, the Department entered into a contract with Jet Holdings, Ltd., d/b/a MicroJet (MicroJet) that allows MicroJet to use prison labor from the Monroe Corrections Center in its water jet cutting business.[19] CP at 5-16, 18. In addition to providing access to prison labor, the contract allows MicroJet to use more than 11,000 square feet of industrial space at the correctional facility rent-free. Many utilities are provided to MicroJet free of charge or at discounted rates. The Department also agreed to provide security and a security orientation session. Under the terms of the agreement, the Department refers prison inmates to MicroJet. MicroJet interviews and hires the inmates, and then pays their wages to the Department as trustee for the inmate-workers. Clearly, under Class I: Free Venture Industries, inmates are being "let out by contract" to a private company in contravention of the Washington State Constitution.

II
ARTICLE II, SECTION 29

After the first day of January eighteen hundred and ninety the labor of convicts of this state shall not be let out by contract to any person, copartnership, company or corporation, and the legislature shall by law provide for the working of convicts for the benefit of the state.
Const. art. II, § 29.

A. *Plain Language*: When interpreting constitutional provisions, we look first to the plain language of the text and will

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[19] Water jet cutting involves precision cutting of hard materials, such as steel and stone, by means of a jet of water borne abrasive material.

accord it its reasonable interpretation. *Anderson v. Chapman,* 86 Wash.2d 189, 191, 543 P.2d 229 (1975) (citing *State ex rel. Evans v. Bhd. of Friends,* 41 Wash.2d 133, 247 P.2d 787 (1952)). If the text is clear, then no construction or interpretation is necessary. *Id.* The words of the text will be given their common and ordinary meaning, as determined at the time they were drafted. *State ex rel. O'Connell v. Slavin,* 75 Wash.2d 554, 557, 452 P.2d 943 (1969) (citing *State ex rel. Albright v. City of Spokane,* 64 Wash.2d 767, 394 P.2d 231 (1964)). This court may also examine the historical context of the constitutional provision for guidance. *See *432 Yelle v. Bishop,* 55 Wash.2d 286, 291, 347 P.2d 1081 (1959) ("In determining the meaning of a constitutional provision, the intent of the framers, and the history of events and proceedings contemporaneous with its adoption may properly be considered.").

A bifurcation of section 29 reveals its intended purpose and scope. The first clause of section 29 provides, "[a]fter the first day of January eighteen hundred and ninety the labor of convicts of this state shall not be let out by contract to any person, copartnership, company or corporation." Const. art. II, § 29. A dictionary published in the same year as the adoption of Washington's constitution provides as its first entry that "let" means "[t]o permit or allow ... grant or afford liberty." 3 THE CENTURY DICTIONARY 3418 (1889). "[A]ny person, copartnership, company or corporation" means any private, nongovernmental entity. Thus, a plain reading of this first section provides that the Department cannot "permit or allow" a private entity to contract for convict labor.

The second section modifies the first. It states, "and the legislature shall by law provide for the working of convicts for the benefit of the state." Const. art. II, § 29. According to this language, the *legislature* may, and is in fact required to, provide work for convicts. However, the convict labor is intended "for the benefit of the state" rather than for the benefit of any "person, copartnership, company or corporation." The two sections, read together, then, indicate that labor for the benefit of the State is mandated, while labor for the benefit of a private enterprise is prohibited.

The majority, on the other hand, asserts that in 1889 the ordinary meaning of "let out by contract" referred solely to the "contract system of labor." The "contract system of labor" was a type of prison labor program that existed in most Northern states by the end of the 1870s under which the State entered into an agreement with a private entity for the labor of the convicts, which was performed within or near the prison. WILLIAM J. FARRELL, PRISONS, WORK AND PUNISHMENT 28 (1994); James J. Misrahi, Note, *Factories with Fences: An Analysis of the Prison Industry Enhancement Certification Program in Historical Perspective,* 33 AM.CRIM. L.REV. 411, 415 (1996). The convicts employed under the contract system were compelled to work, frequently with no safety precautions, which led to numerous accidents. FARRELL, *supra,* at 95. There were also frequent allegations of corruption and bribery. *Id.* at 92.

Although the majority maintains that inmates were treated with extreme cruelty under the contract system, the sources relied upon actually discuss the brutality that existed under the *lease system* rather than the contract system. *See* majority at 311 (citing DAVID M. OSHINSKY, "WORSE THAN SLAVERY" PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996) (discussing the history of the lease system in Mississippi) and *State ex rel. Greaves v. Henry,* 87 Miss. 125, 40 So. 152, 162 (1906) (Whitfield, C. J., dissenting) (discussing the evils that occurred in the past under the lease system)). The lease system, which existed primarily in the South, was different from the contract system in that the convicts were under the complete control of the private lessees. Misrahi, *supra,* at 416. Under the lease system, "inmates were subject to unspeakable brutality." Stephen P. Garvey, *Freeing Prisoners' Labor,* 50 STAN. L.REV. 339, 357 (1998). The contract system was different, however, as the "treatment of so-called free workers was not very different from that of inmate workers." Misrahi, *supra,* at 416. Thus, the contract and lease systems were distinct, and the horrors of one cannot necessarily be attributed to the other.

The majority maintains that the framers of our constitution sought to prevent the inhumane, corrupt, and involuntary nature of the contract system of convict labor by drafting article II, section

29. However, the majority contends that the framers did not intend to prevent all contracts between the State and private entities for the labor of prisoners. Section 29 makes no mention of restricting convict labor to that which is voluntary nor does it specifically state that the "contract system of labor" was thereby abolished. Furthermore, the second clause of section 29, which provides that the State must benefit, indicates that what was being forbidden was broader than simply the "contract system of labor."

B. *Historical Context* : The plain language interpretation of section 29 is further supported by the historical context surrounding the Washington Constitutional Convention of 1889. This court has stated that "[i]n determining the meaning of a constitutional provision, the intent of the framers, and the history of events and proceedings contemporaneous with its adoption may properly be considered." *Yelle*, 55 Wash.2d at 291, 347 P.2d 1081.

It was competition with free labor, rather than the cruelty of the system as the majority asserts, that led to the eradication of private sector involvement in convict labor in the late nineteenth century. "The long-term and sustained efforts of free laborers and manufacturers, rather than the concerns of convict exploitation, led to the eventual abolition of private sector involvement in prison industry." Misrahi, *supra,* at 417; *see also* Garvey, *supra,* at 342 ("Prison labor disappeared primarily because organized labor unions and business organizations wanted to eliminate the competition."). Commenting on the push to end convict leasing in Mississippi, one author states that its termination was not pursued on "humanitarian grounds." OSHINSKY, *supra,* at 52. Rather, small farmers wanted reform because "the forced labor of black prisoners had enriched a clique of arrogant planters and businessmen at the expense of everyone else. It had provided an unfair advantage to the people who deserved and needed it least." *Id.* A book on prisons published just three years before the adoption of our constitution states: "[T]he objection to convict labor, as now managed in most prisons, is that it is contracted out at such figures that the honest free laborers are reduced to starvation in the necessary competition which ensues...." JOHN P. ALTGELD, OUR PENAL MACHINERY AND ITS VICTIMS 111 (1886). Clearly, concern over competition with free labor

was the prevailing rationale at the time for prohibiting contracts with private industry for the labor of convicts.

Again, while the majority asserts that the delegates to Washington's constitutional convention were primarily concerned with "the extensive reputation for brutality, corruption, and ineffectiveness that the contract system of convict labor had in the Washington Territory and throughout the country," majority at 317, there is substantial evidence that a major concern at the convention was competition with free labor. First, at the convention, President John Hoyt presented a petition from the local labor union requesting that the following provision be included in the constitution: "Convict labor shall not be employed in competition with free labor." *Suggestions from Tacoma,* THE TACOMA DAILY LEDGER, July 18, 1889, at 4. Hoyt shared this request only weeks before the committee debated article II, section 29. Thus, the competition that convict labor would create with the private sector was undoubtedly in the forefront of the committee members' minds as they entered the debate for the convict labor provision.

The majority maintains that because this provision was not actually adopted, we cannot "give article II, section 29 the precise meaning the framers refused to adopt." Majority at 318. However, it is not surprising that the delegates rejected this provision in favor of the one actually adopted. Had the delegates adopted such a blanket prohibition, all prison labor would have been prohibited, as even state-run prison industries compete indirectly with free labor industries. *See* FARRELL, *supra,* at 30 (stating that when the State employs convict labor to manufacture goods for its own use, there is indirect competition with free labor). Thus, it is likely that the delegates rejected this provision because they wished to preserve the legislature's right to provide work for convicts "for the benefit of the state," rather than because they were not concerned about competition with free labor. Article II, section 29 represents a compromise between preventing competition and allowing convicts to work for the State's benefit, despite the resulting indirect competition.

Further evidence that competition was on the delegates' minds comes from an August 10, 1889, article in *The Tacoma*

Daily Ledger, which carried the headline, "Delegates Oppose Leasing the Services of Criminals to Corporations." LEDGER, *supra,* Aug. 10, 1889, at 4. The article revealed the discomfort of some of the delegates with allowing convict labor to be utilized by private entities, while suggesting their relative support for using convict labor for public works. Referring to the committee members involved in the debate, the article stated, "Mr. Weir was opposed to leasing convict labor, or to bringing pauper labor in competition with honest workingmen." *Id.; see also* THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION: 1889, at 545 (Beverly Paulik Rosenow ed., 1999). T.M. Reed, another committee member, "thought convict labor was demoralizing to the laboring classes." LEDGER, *supra,* Aug. 10, 1889, at 4. In addition, "Mr. Prosser was also opposed to using convict labor." *Id.* Mr. Buchanan, meanwhile, "thought the convicts should be used on public works, and so did Mr. Lindsley." *Id.* Therefore, there was clearly a concern among the delegates about the issues of competition with free labor and the use of convict labor for nonpublic works.[20] At the end of the debate, both sections of the provision remained: one forbidding convict labor for private entities and the other mandating the use of convict labor for the benefit of the State.

In the years preceding the convention, the political life of our emerging state was dominated by the populist movement, which strongly influenced Washington's constitution. Hugh Spitzer, *Washington Constitution's Suspicion of Big Business is Built-in,* SEATTLE POST-INTELLIGENCER, Nov. 19, 1997, at A15. Although Washington's Populist Party was not formalized until 1891, support for populist philosophies was strong throughout the 1880s. Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide 11 (2002). By 1889, "a wave of populism lapped against the shores of Olympia as

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[20] There is, however, no record of any discussion by the committee members about the cruel or involuntary nature of the contract system. *See* THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION: 1889, AT 545 (Beverly Paulik Rosenow ed.,1999).

the constitution was drafted." *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wash.2d 413, 445, 780 P.2d 1282 (1989) (Utter, J., concurring).

Populism sprang primarily from agrarian roots and emphasized a philosophy of protection for small businesses and the working citizen. *Id.* Central among the populist ideals was the protection of the individual from unfair advantages created by coalitions between big government and politically connected big businesses. *See generally* James M. Dolliver, *Condemnation, Credit, and Corporations in Washington: 100 Years of Judicial Decisions--Have the Framers' Views Been Followed?*, 12 U. PUGET SOUND L.REV. 163 (1989). "The populists wished to protect personal, political, and economic rights from both the government and [big] corporations, and they strove to place strict limitations on the powers of both." Utter, *supra,* at 519. To achieve this, the populists strove to erect a "fire wall between the public and private sectors." Hugh Spitzer, *Washington's Constitution and How It Affects Us,* SEATTLE POST-INTELLIGENCER, Nov. 16, 1997, at E1. It was with this mindset that the framers drafted article II, section 29. Robert F. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment,* 8 U. PUGET SOUND L.REV. 157, 178 (1985).

As the focus of convict labor programs shifted from reformatory to economic, labor interests also exerted a powerful influence on the creation and amendment of State convict labor provisions. FARRELL, *supra,* at 98-99. The 1880s in Washington was a time of serious social upheaval, including labor unrest, as the railroad expansion led to rapid urbanization and a population explosion. UTTER & SPITZER, *supra,* at 11. After the railroad's completion, wide scale unemployment generated additional tensions. Mary W. Avery, History and Government of the State of Washington 197 (1961). As a result, the Knights of Labor gained considerable local popular support, and its People's party won the Seattle mayoral election in 1886. *Id.* at 196. Serious clashes between private armies hired by mine owners and the mineworkers in the Cascade coal fields in the late 1880s ensured that labor issues influenced the debate at the constitutional convention. Carlos A. Schwantes, Radical Heritage: Labor,

Socialism, and Reform in Washington and British Columbia, 1885-1917, at 32 (1979). Two members of the convention directly represented labor: Matt J. M'Elroy, a logger, and William L. Newton, a coal miner. *Id.* One historian credits the two prolabor provisions--article 29, section 2 and article 1, section 24 (forbidding corporations from employing armed bodies of men)--directly to the labor influence on the delegates. *Id.*

Labor movement objections to convict labor existed at the national level as well. Although prison labor was heavily utilized throughout the nineteenth century, labor and business interests began to lobby against it in the 1880s and 1890s, claiming that "prison workers and the businesses that employed them had unfair advantages." Brian Hauck, *Prison Labor,* 37 HARV. J. ON LEGIS. 279, 281 (2000) (referencing Prison Industry Enhancement Certification Program Guidelines, 64 Fed.Reg. at 17,001); *see also* FARRELL, *supra,* at 98. Industry and an increasingly organized labor movement began to object to the sale of prison goods in the free market. FARRELL, *supra,* at 98. At its first convention, the National Labor Union, a precursor to the Knights of Labor, advocated for convict labor " 'which will least conflict with honest industry outside the prisons.' " *Id.* During the mid-1880s and 1890s, the contract system of convict labor was abolished in several northern states. *Id.; see also* Blake McKelvey, *The Prison Labor Problem: 1875-1900,* 25 J.CRIM. L. & CRIMINOLOGY 254, 258 (1934). Thus, by the time the Washington State Constitutional Convention convened, the main function of prison labor had become economic and convict labor had become increasingly controversial, since it began to threaten both free laborers and manufacturers. FARRELL, *supra,* at 98.

That the founders of our fledgling State were mindful of preventing competition with existing industry and free labor is also evident from the prison work programs implemented after the territorial government regained custody of its prisoners from private contractors immediately preceding the constitutional convention. The Washington Territory originally housed its prisoners in county jails. *State Prison: A History of Adult Corrections in Washington,* PERSPECTIVE, Spring--Summer 1966, at 5 (hereinafter *State Prison*). However, the legislature

soon recognized the need to provide a central facility and entered into a contract with William Billings, the sheriff of Thurston County, to take custody of all the convicts in one location. *Id.* at 6. Billings agreed to build a territorial prison in exchange for a maintenance allowance for each convict and the right to use their labor. *Id.* Under Billings' supervision, the convicts worked at logging, coal mining, and barrel-making. *Id.* at 7. This system proved to be quite profitable for Billings and his associates. *Id.* After 13 years, however, the government decided to abandon this "free enterprise" prison system and take over the supervision of prisoners itself. *Id.* The territorial government then built a new penitentiary in Walla Walla to be managed by the State. *Id.; see also* MESSAGES OF THE GOVERNORS OF THE TERRITORY OF WASHINGTON TO THE LEGISLATIVE ASSEMBLY, 1854-1889, at 250 (Charles M. Gates ed., 1940).

After the territorial government took over the care of its prisoners, prison officials continued to recognize the need for providing work for the convicts while also striving to prevent competition with free labor. Seeking to fulfill the goals of reducing idleness and assisting the prison financially, the prisoners at the Walla Walla penitentiary were first put to work making bricks. *State Prison, supra,* at 11. The commissioners later recommended expanding the prison's existing brick-making enterprise because, among other reasons, "no industry or institution would be materially injured thereby." *The Walla Walla Prison: The Commissioners' Report to the Governor,* THE TACOMA DAILY LEDGER, Nov. 27, 1889, at 2 (hereinafter *Commissioners' Report*). The prison also built a jute mill for the manufacture of burlap wheat bags upon the recommendation of the penitentiary's superintendent. *Id.* An 1887 report to the territorial governor by the superintendent discussed the need to provide work for the convicts in his care and suggested burlap bag manufacturing as an ideal industry because it "would in no [sic] come in competiion [sic] with any local enterprise." WASHINGTON STATE PENITENTIARY, SUPERINTENDENT'S REPORT TO THE GOVERNOR AND LEGISLATIVE ASSEMBLY OF WASHINGTON TERRITORY 8 (Supp.1887). Furthermore, a letter from the commissioners of the Walla Walla penitentiary states that "we at once took into

consideration the best means of employing the convicts to the benefit of the penitentiary, and at the same time not injure local industries." *Commissioners' Report, supra,* at 1. Thus, although territorial government officials recognized the need to provide some sort of work for convicts, they were also hesitant about providing any sort of work that might compete directly with free labor.

This examination of the historical period surrounding Washington's constitutional convention demonstrates that at both the State and national levels, competition with free labor was a prevailing concern.

C. *Other States' Interpretations of Similar Constitutional Provisions*: Because Washington courts have not previously interpreted article II, section 29,[21] it is appropriate to turn to other states with similar constitutional provisions for guidance. *See Waremart, Inc. v. Progressive Campaigns, Inc.,* 139 Wash.2d 623, 638-39, 989 P.2d 524 (1999); *see also *441 Biggs v. Dep't of Ret. Sys.,* 28 Wash.App. 257, 259, 622 P.2d 1301 (1981).

(1) *California*: The California State Constitution provides that: " 'The labor of convicts shall not be let out by contract to any person, copartnership, company or corporation, and the Legislature shall, by law, provide for the working of convicts for the benefit of the State.' " *Pitts v. Reagan,* 14 Cal.App.3d 112, 115, 92 Cal.Rptr. 27 (1971) (quoting Cal. Const. art. X, § 1 (formerly art. X, § 6, *repealed* 1960)). That California's provision is nearly identical to Washington's article II, section 29 is not surprising.[22] California's

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[21] A Washington attorney general did render an opinion in 1934, however. The attorney general was asked whether the State could agree to supply prison labor to a nursery, which would provide the State with plants and shrubs for an agreed upon value. Citing article II, section 29, the attorney general's office replied, "[A]ny arrangement whatever by which prisoners ... would perform labor for private interests, the state to receive something in return therefor, would be a violation of the above mentioned constitutional and statutory provisions." WASHINGTON ATTORNEY GENERAL OPINIONS 318 (1934).

[22] In addition to the parity in language, legal scholars have also recognized the influence California's constitution had in the formation of Washington's constitution. *See* Dolliver, *supra,* at 170 (citing Arthur S. Beardsley, *Sources of*

constitutional convention was held only a decade prior to Washington's, in a similar political climate where a strikingly similar debate arose. *See Pitts,* 14 Cal.App.3d at 118, 92 Cal.Rptr. 27. For example, when a motion was made to strike the language, " 'The labor of convicts shall not be let out by contract to any person, copartnership, company or corporation,' " several representatives spoke in favor of its retention. *Id.* at 118, 92 Cal.Rptr. 27. Comments such as the following were stated in favor of keeping the section: " 'It is a burden upon free laborers for the State to contract the labor of these prisoners' "; " 'a very great evil' is that 'it brings this prison labor in competition with free white labor' "; and " '[t]he interests of the laboring classes are directly in conflict with the interest of those who employ contract labor.' " *Id.* at 118-19, 92 Cal.Rptr. 27 (quoting Delegates Condon, Freud, and Beerstecher). The comments from Washington delegates echoed these sentiments only 10 years later.[23] California's interpretation of its article X, section 1 is therefore instructive when interpreting our article II, section 29.

In *Pitts,* the California court of appeals interpreted the convict labor clause in its constitution in light of an "Emergency Harvest Program," under which convict labor was used for harvesting privately owned crops during periods of alleged labor shortages. 14 Cal.App.3d at 114-15, 92 Cal.Rptr. 27. In light of California's constitutional provision, the court of appeal held that the use of convict labor was prohibited in the case before it. The court concluded, "[T]he instant language of article X, section 1, is intended in the broader sense--that the state may not let out convict labor by contract to private employers regardless of whether the state or the convicts or both receive the attendant consideration." *Id.* at 117-18, 92 Cal.Rptr. 27. It did not matter to the court whether the convicts consented or that they were paid "going wages." *Id.* at 118, 92 Cal.Rptr. 27. Rather, the court was concerned with the *competition* with the private sector that the use

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the Washington State Constitution, reprinted in 1987-88 WASHINGTON LEGISLATIVE MANUAL 362 (1987)).

[23] *See supra* page 327.

of convict labor presented, stating:

> Little imagination is required to visualize the effects of convicts in this manner competing in the state's labor market. And there would seem little doubt that the terse words of article X, section 1, "The labor of convicts shall not be let out by contract" to private persons were not intended to allow such a practice.

Id. at 118, 92 Cal.Rptr. 27.

The majority argues that the *Pitts* court invalidated the labor program at issue because there were no contracts between the growers and the prisoners, only between the growers and the State. Although the *Pitts* court noted that "[t]here were no individual contracts between the growers and the prisoners," *id.* at 116, 92 Cal.Rptr. 27, there is no indication that this was the basis for its holding. Furthermore, the majority implies that because the *Pitts* court stated that a "convict may himself sell or hire out his services to a private person," *id.* at 117, 92 Cal.Rptr. 27, the court would have validated our Class I industries. However, this ignores the critical distinction recognized by the *Pitts* court, which was that there was a contract between the State and private entities, just as there is in our Class I industries program. The court defined the issue before it as "whether the state, without profit or consideration to itself, is permitted by article X, section 1, to furnish convict labor to private individuals or organizations under contract or other agreement." *Id.* There is no indication in that statement that the court was particularly concerned with whether there were contracts between the convicts and the private enterprise.

The facts of *Pitts* are quite similar to those before us. In both instances, prison labor is being utilized by a private industry by virtue of a contract with the State. Given the closeness in the timing of the adoption of our State's constitutions and the language of each provision, the California court's conclusion is persuasive in

interpreting our own constitution and in an analysis of the driving concerns behind the respective provisions.[24]

(2) *Illinois* : A provision in the Illinois constitution also mirrors our own. Arthur S. Beardsley, *Sources of the Washington State Constitution reprinted in* 1987-88 WASHINGTON LEGISLATIVE MANUAL 376 (1987). Indeed, it is reported that Washington delegates were influenced by the Illinois constitution when modeling our own and when drafting the convict labor section in particular. *Bond v. Burrows,* 103 Wash.2d 153, 157-58, 690 P.2d 1168 (1984); JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, *supra,* at 545 n. 53 (citing as similar Ill. Const. 1870 (Amendment of 1886)); Beardsley, *supra,* at 376.

The fourth amendment to the Illinois State Constitution states, " 'Hereinafter it shall be unlawful for the commissioners of any penitentiary, or other reformatory institution in the State of Illinois, to let by contract to any person, or persons, or corporations, the labor of any convict confined within said institution.' " *K. & S. Mfg. Co. v. Illinois,* 7 Ill. Ct. Cl. 107, 1932 WL 2943, at *1 (1932) (quoting Ill. Const. (amend.4)). This amendment became effective in 1886 after organized labor staged a successful boycott of prison-made goods, thus echoing Washington's own labor influence during the time of its constitutional convention. *See* McKelvey, *supra,* at 256 n. 6.

When the fourth amendment to the Illinois Constitution was challenged, the state court of claims' response was direct. It stated, "The language of this provision is plain, and its purpose can not be misunderstood. It was intended to prevent prison labor from entering into competition with free labor." *K. & S. Mfg.,*

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[24] Indeed, the use of convict labor during labor shortages would arguably provide more of a state benefit than allowing a private industry to utilize a cheap prison workforce. Under the former program, the State would benefit because were it to forbid the farmers to utilize prison labor for harvesting, the crops might not be harvested and the income from selling the crops would not return to the State to enhance its economy. In contrast, the water jet industry is not short on labor. It would likely survive without prison labor as evidenced by the number of competitors in the field.

1932 WL 2943, at *1. In *K. & S.*, a manufacturing company sought damages from a contract with the department of public welfare for the manufacture of furniture at the Stateville prison. The court unequivocally recognized: "Any contract the effect of which is to let the labor of the prisoners is in violation of this clause of the Constitution and wholly void, and no cause of action can be based upon it." *Id.*

In 1903, Illinois enacted legislation that reflected the language of its constitution, but permitted prisoners to work under certain conditions. *See id.* at *2. Section 5 of the Illinois law provided that the board of prison industries,

> "shall not ... make any contract by which the labor or time of any prisoner or convict in any penitentiary or reformatory of this State or the product or profit of his work shall be contracted, let, farmed out, given or sold to any person, firm, association or corporation; except that said prisoners or convicts in said penal or reformatory institutions may work for, and the products of their labor may be disposed of to the State, or for or to any public institution owned or managed and controlled by the State."

Id. (quoting Ill. Const. (amend.4)).

This section resembles the "public benefit" clause of article II, section 29 of the Washington State Constitution and thus sheds additional light on the interpretation of our own provision.

Supplementing its interpretation of the fourth amendment, the Illinois court found the Illinois legislature's actions consistent with the constitution's goal of prohibiting prison labor from competing with the private market. The court said that the law "is in harmony with the letter and spirit of the fourth amendment to the Constitution." *Id.* Thus, convict labor could permissibly be used for the benefit of the State, so long as prison labor did not compete with the private market. The court stated,

> It is clear ... that the intention of the legislature was to prevent the competition of prison labor with free labor; that it intended the prisoners should be employed in such work and in the manufacture of such articles as could be used by the State, the institutions of the State and the school and road districts of the State so that the products of their labor would not enter into [sic] goods sold on the open market to the general public.

Id. at *2. As with the *Pitts* case from California, the Illinois court's reasoning is persuasive in concluding that the Department's program, though legislatively authorized, violates the Washington State Constitution.

(3) *Other States:* The majority contends that Utah, New York, and Oklahoma courts have all rejected the proposition that their constitutional provisions preventing contracts for convict labor were intended to prevent competition with free labor. However, the cases cited by the majority all address programs or issues that are critically different from the case before us.

The majority first cites *Utah Manufacturers Ass'n v. Mabey,* 63 Utah 374, 226 P. 189 (1924), stating that "[t]he Utah Supreme Court clearly understood 'contracting' to mean the contract system of convict labor." Majority at 318. In *Utah Manufacturers,* the court concluded that the program at issue did not have "any of the elements of 'contracting convict labor,' " and therefore did not violate Utah's constitution. *Id.* at 189. However, the program in *Utah Manufacturers* was critically different from the one in the case at bar, as it was a *state-run* program that was controlled and supervised by state officials. *Id.* The court distinguished a case that had been decided the year before involving a convict work program in which a private company provided the materials, machinery, and supervision while the prison provided the labor of the convicts, the manufacturing space, and the utilities. *Id.* at 189-90 (discussing *Price v. Mabey,* 62 Utah 196, 218 P. 724 (1923)). The *Price* court invalidated the

program, finding that it was "in its essence a contract for the hiring of prison labor." *Price,* 218 P. at 727. The *Utah Manufactures* court concluded that *Price* was not determinative in the case before it because the program in its case was state-run whereas the *Price* program "amounted to hiring convict labor to a corporation not under the control or management of the state or its officials." *Utah Mfrs.,* 226 P. at 190. The Utah court clearly drew a distinction between permissible state-run labor programs and impermissible programs in which the State contracted out the labor of its convicts to private enterprises. The holdings in *Utah Manufacturers* and *Price* thus do not conflict with what I believe should be our holding today.

The majority also cites *Rice v. State,* 108 Okla. 4, 232 P. 807 (1924), which involved a shirt factory that was installed in the penitentiary and operated by the State. The State agreed to sell the shirts made by the inmates to a private enterprise. The majority maintains that the court rejected the argument that its constitution was meant to prevent competition between free labor and prison labor. However, as in *Utah Manufacturers,* this case concerned convict labor under the supervision and for the benefit of the State, not a private enterprise. In addition, the court was merely addressing whether convict-made goods could be sold on the open market even though they might compete indirectly with goods produced by free labor.[25] The *Rice* court found that state-run programs that produce goods for sale on the open market are constitutional, stating:

> [I]t is necessary that those confined be employed.... The fact that such employment may produce a commodity to be sold on the market in competition with goods produced by free labor does not render the purpose a private one.
>
> The state is entitled to the labor and service of its convicts while confined in its prisons, and has the authority to produce by such labor things of commercial value.

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[25] *See supra* page 326.

Id. at 810.

The *Rice* court, however, did not find that *all* convict work programs, such as those in which convicts compete with free laborers for jobs, were permissible under its constitution.

Similarly, in *People v. Hawkins,* 157 N.Y. 1, 51 N.E. 257 (1898), the New York court of appeals held that its constitution was not designed to suppress competition by forbidding the sale of prison-made goods to the general public. The majority characterizes the *Hawkins* court as rejecting the argument that its constitution was designed to suppress competition between prison laborers and free laborers. The issue in *Hawkins,* however, was not whether prisoners could work in private industry in competition with free workers, but rather whether convict-made *goods* could be sold to the public without being labeled as such. *Hawkins,* 51 N.E. at 258. As in *Rice,* the *Hawkins* court found that the State could not prohibit the sale of prison-made goods even though it might compete with goods made by free labor.

The majority thus mischaracterizes the holdings of these three cases, asserting that the courts found that their constitutions were not meant to protect free labor from competition with convict labor. In contrast, what these cases all stand for is that as long as a prison work program benefits the State and is state run, the various State constitutional provisions do not prevent the sale of the resulting prison-made goods, even though these goods inevitably compete on some level with goods made by free labor. The problem with the Class I industries program is that inmates work for a private enterprise in competition with free laborers and for the benefit of that enterprise in accordance with an agreement between the State and the enterprise. This issue was not raised by *Utah Manufacturers, Hawkins,* or *Rice,* and these cases are therefore of little value in answering the precise question before us.

III
CONCLUSION

The benefits of providing employment opportunities for

convicts are not in dispute. Yet even if this court found Class I industries to be unconstitutional, there would remain four valid classes of inmate work programs under RCW 72.09.100(2)-(5),[26] as well as work release programs as established in chapter 72.65 RCW. The Class I industries program at issue in this case is different from these permissible programs because there is a contract between the private enterprise and the State for the benefit of the private enterprise.

I would hold that the "private sector partnership" formed between MicroJet and the Department, as permitted by RCW 72.09.100(1), is in direct conflict with article II, section 29 of the Washington State Constitution. Although I recognize the laudable public policy goals behind the legislation and the Department's actions in creating this program, I am compelled by the plain language of article II, section 29 and the historical context in which it was adopted to find it unconstitutional.

ALEXANDER, C.J., SANDERS, J., and SMITH J.P.T., concur.

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[26] The four additional inmate work programs are Class II: Tax Reduction Industries, RCW 72.09.100(2); Class III: Institutional Support Industries, RCW 72.09.100(3); Class IV: Community Work Industries, RCW 72.09.100(4); Class V: Community Service Programs, RCW 72.09.100(5). All of these programs must be operated by or under the supervision of the Department and therefore do not run afoul of our constitution.

APPENDIX E

SUPREME COURT OF WASHINGTON

WASHINGTON WATER JET WORKERS ASSOCIATION; Talon Industries, Inc.; Cutting Technology, Inc.; Pacific-Rim Enterprises, Ltd.; Jetpoint Technologies L.L.C.; Specialty Metals Corp.; Definitive Solutions & Technologies, Inc.; and Maxtec, Inc., Appellants,	)	No. 70814-2
v.	)	**APPELLANTS' OPENING BRIEF**
Howard YARBROUGH, in his official capacity as the Administrator of the Division of Correctional Industries; Washington State Department of Corrections, Division Of Correctional Industries; Jet Holdings, Ltd., d/b/a Microjet; and Kenneth Piel and Sharon Piel, Respondents.	)	

ASSIGNMENTS OF ERROR AND ISSUES

PERTAINING TO ASSIGNMENTS OF ERROR

1. The Superior Court erred when it entered its Order on Partial Summary Judgment (Appendix A) granting summary judgment to the State Defendants on the constitutionality of RCW 76.09.100(1) and denying the Appellants' motion for summary judgment on the constitutionality of the contract between the State

Defendants and MicroJet.

A. Does RCW 76.09.100(1) violate Article II, Section 29 of the Washington Constitution by authorizing contracts allowing private companies to employ prisoners?

B. Was any evidence submitted that would create a triable issue of material fact that could save Corrections' contract with MicroJet from the prohibition in Article II, Section 29 of the Washington Constitution?

C. Are the Appellants entitled to judgment as a matter of law that Corrections' contract with MicroJet violates Article II, Section 29 of the Washington Constitution?

2. The Superior Court erred when it entered its Order Granting State Defendant's Motion to Dismiss and Order of Dismissal for Failure to State a Claim (Appendix B, C, and D) dismissing the Appellants' cause of action for violation of 18 U.S.C. § 1761(c), 42 U.S.C. § 1983, and all claims for relief against Kenneth and Sharon Piel.

A. May a private cause of action be implied on behalf of private companies competing with the private employer of prison labor to enforce the requirement in 18 U.S.C. § 1761(c)(2)

that prisoners be paid wages comparable to those paid to workers outside of prison?

B. May private companies competing with the private employer of prison labor sue under 42 U.S.C. § 1983 to enforce 18 U.S.C. § 1761(c)(2)'s requirement that prisoners employed by private companies be paid wages comparable to those paid to workers outside of prison?

C. Does the Washington Water Jet Workers Association have standing to assert a claim for declaratory and injunctive relief under 42 U.S.C. § 1983 on behalf of its members?

D. Did the Appellants sufficiently allege that Respondents caused a violation of their rights protected by 42 U.S.C. § 1983?

E. Is the Appellants' claim for relief under 42 U.S.C. § 1983 ripe for adjudication even though there has been no federal prosecution of a crime?

F. When suing a corporate officer for tort claims and claims under Chapter 19.86 RCW, does a plaintiff need to allege facts in the complaint sufficient to defeat the officer's corporate veil defense?

G. Is there any bar to suing a corporate officer for his or her own illegal conduct even if conducted purportedly on behalf of a corporation?

APPENDIX F

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

WASHINGTON WATER JET WORKERS ASSOCIATION; et al., Plaintiff, v. Howard YARBROUGH, in his official capacity as the Administrator of the Division of Correctional Industries, et al., Defendants.	No. 99-2-20202-3 SEA **ORDER CORRECTING PRIOR ORDER ON SUMMARY JUDGEMENT**

Defendant MicroJet's motion for summary judgment is GRANTED nunc pro tunc to October 30, 2000: as to Plaintiff's Second Amended Complaint

1. violation of 18 U.S.C. sec. 1761 is dismissed with prejudice;
2. violation of 42 U.S.C. sec. 1983 is dismissed with prejudice;
3. all claims against Kenneth Piel and Sharon Piel individually are dismissed with prejudice;

Plaintiff's claim regarding RCW 19.86 et seq remain before the court.

DATED: November 6, 2000

/S/ James A. Doerty
JUDGE JIM DOERTY

APPENDIX G

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

WASHINGTON WATER JET WORKERS ASSOCIATION; et al.,	)	No. 99-2-20202-3 SEA
Plaintiffs,	)	**ORDER GRANTING STATE DEFENDANTS' MOTION TO DISMISS**
v.	)	
HOWARD YARBROUGH, et al.,	)	
Defendants.	)	

THE COURT, upon hearing State Defendants' Motion to Dismiss, all parties appeared through counsel, and the Court having considered the pleadings before it and the legal authorities cited therein, and being fully advised,

The Court finds and concludes that State Defendants Howard Yarbrough and the Washington State Department of Corrections are entitled, as a matter of law, to judgment in their favor dismissing the following counts of Plaintiffs' complaint with prejudice:

1. ~~Violation of Article II, Section 29 of the Washington Constitution (¶¶ 26-29 of Plaintiffs' Second Amended Complaint);~~ *denied*

2. ~~Violation of RCW 72.09.100 (¶¶ 36-39 of Plaintiffs' Second Amended Complaint);~~ *denied*

3. ~~Violation of RCW 72.09.070 (¶¶ 40-46 of Plaintiffs' Second Amended Complaint);~~ *denied*

4. Violation of 18 U.S.C. § 1761 (¶¶ 47-51 of Plaintiffs' Second Amended Complaint); *granted*

5. ~~Violation of RCW 19.86 (¶¶ 56-60 of Plaintiffs' Second Amended Complaint);~~ *denied*

6. Violation of 42 U.S.C. § 1983 (¶¶ 61-65 of Plaintiffs' Second Amended Complaint). *granted*

State Defendants' Motion to Dismiss for failure to state a claim is therefore GRANTED.

Accordingly, the following counts of Plaintiff's complaint are DISMISSED with prejudice:

1. ~~Violation of Article II, Section 29 of the Washington Constitution (¶¶ 26-29 of Plaintiffs' Second Amended Complaint~~); *denied*

~~2. Violation of RCW 72.09.100 (¶¶ 36-39 of Plaintiffs' Second Amended Complaint);~~ *denied*

~~3. Violation of RCW 72.09.070 (¶¶ 40-46 of Plaintiffs' Second Amended Complaint);~~ *denied*

4. Violation of U.S.C. § 1761 (¶¶ 47-51 of Plaintiffs' Second Amended Complaint); *granted*

~~5. Violation of RCW 19.86 (¶¶ 56-60 of Plaintiffs' Second Amended Complaint);~~ *denied*

6. Violation of 42 U.S.C. § 1983 (¶¶ 61-65 of Plaintiffs' Second Amended Complaint). *granted*

IT IS SO ORDERED.

DONE IN OPEN COURT this 30 day of October, 2000.

/S/ James A. Doerty
JUDGE JAMES DOERTY
King County Superior Court

Presented by:
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/S/
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and Piel

APPENDIX H

18 U.S.C. § 1761.

(a) Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution, shall be fined under this title or imprisoned not more than two years, or both.

(b) This chapter shall not apply to agricultural commodities or parts for the repair of farm machinery, nor to commodities manufactured in a Federal, District of Columbia, or State institution for use by the Federal Government, or by the District of Columbia, or by any State or Political subdivision of a State or not-for-profit organizations.

(c) In addition to the exceptions set forth in subsection (b) of this section, this chapter shall not apply to goods, wares, or merchandise manufactured, produced, or mined by convicts or prisoners who--

(1) are participating in--one of not more than 50 non-Federal prison work pilot projects designated by the Director of the Bureau of Justice Assistance;

(2) have, in connection with such work, received wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed, except that such wages may be subject to deductions which shall not, in the aggregate, exceed 80 per centum of gross wages, and shall be limited as follows:

(A) taxes (Federal, State, local);

(B) reasonable charges for room and board, as determined by regulations issued by the chief State correctional officer, in the case of a State prisoner;

(C) allocations for support of family pursuant to State statute, court order, or agreement by the offender;

(D) contributions to any fund established by law to

compensate the victims of crime of not more than 20 per centum but not less than 5 per centum of gross wages;

(3) have not solely by their status as offenders, been deprived of the right to participate in benefits made available by the Federal or State Government to other individuals on the basis of their employment, such as workmen's compensation. However, such convicts or prisoners shall not be qualified to receive any payments for unemployment compensation while incarcerated, notwithstanding any other provision of the law to the contrary; and

(4) have participated in such employment voluntarily and have agreed in advance to the specific deductions made from gross wages pursuant to this section, and all other financial arrangements as a result of participation in such employment.

(d) For the purposes of this section, the term "State" means a State of the United States and any commonwealth, territory, or possession of the United States.

APPENDIX I

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.